IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, Secretary of the Interior, ET AL.,
Petitioners,
v.
SIERRA CLUB, ET AL.,
Respondents.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,
v.
SIERRA CLUB, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

BRUCE J. TERRIS
SUELLEN T. KEINER
NATHALIE V. BLACK
1908 Sunderland Place, N.W.
Washington, D.C. 20036
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

The question originally presented in this Court was:

> whether the National Environmental Policy Act (NEPA) permits federal agencies to take numerous major federal actions related to the massive development of coal resources in the Northern Great Plains without first preparing and considering a regional environmental impact statement related to the cumulative environmental impacts of federal actions within the entire region.

Since this Court granted the writs of certiorari, the Department of the Interior has adopted the policy of preparing regional environmental impact statements pursuant to the National Environmental Policy Act when it proposes or takes related actions, in a particular geographical area and has applied this policy to coal development in the Northern Great Plains. As a result, respondents submit that the original question is no longer in controversy and that the question presented is as follows:

> Whether the appropriate geographical area for preparation of a regional environmental impact statement under the National Environmental Policy Act is the entire Northern Great Plains region rather than smaller portions of that region.

STATEMENT OF THE CASE

Procedural Background

Respondents [1] brought suit on June 13, 1973, in the District Court for the District of Columbia seeking a declaratory judgment, mandamus and injunctive relief against the federal petitioners relating to the development and exploitation of the vast coal reserves of the

[1] Respondents are the Sierra Club, National Wildlife Federation, Northern Plains Resource Council, League of Women Voters of Montana, Montana Wilderness Association, Montana League of Conservation Voters, and League of Women Voters of South Dakota.

Fort Union and Powder River formations located in eastern Montana, northeastern Wyoming, western North Dakota, and western South Dakota—the Northern Great Plains region. The federal actions which respondents sought to enjoin included issuance, grant or approval of coal prospecting and exploitation permits, coal mining leases, coal mining plans, water options and contracts, diversions of water from and placement of structures in navigable waterways, and permits for rights-of-way.

Respondents claimed that the federal petitioners had violated, and were continuing to violate, Sections 102(2)(A), (C) and (D) of the National Environmental Policy Act (NEPA), 42 U.S.C. 4332(2)(A), (C) and (D), by taking these actions related to coal development in the Northern Great Plains region without preparing and considering a comprehensive environmental impact statement analyzing the cumulative effect of these actions on a region-wide basis, and without preparing and considering systematic interdisciplinary studies and a study of appropriate alternatives.

The district court granted the motions of the federal petitioners and the industry petitioners who had intervened (hereafter AEP petitioners) for summary judgment on February 14, 1974. The court concluded, *inter alia*, that since the federal petitioners had not developed an overall regional program or plan for their numerous actions related to coal development in the Northern Great Plains, NEPA did not require preparation of a comprehensive, regional environmental impact statement. Fed. Pet. App. D pp. 98A-99A.[2]

[2] "Fed. Pet. App." refers to the appendices contained in the Petition for a Writ of Certiorari filed by the federal petitioners; "Br. Opp. App." refers to the appendices attached to the Brief of Respondents in Opposition; "AEP Br. App." refers to the appendix attached to the Brief for Petitioners American Electric Power System, *et al*; "App." refers to the appendix prepared for this Court and "Ct. of Appeals App." refers to the appendix prepared for the court of appeals and part of the record now before this Court.

During the pendency of the suit in the district court, the Secretary of the Interior had announced a coal leasing policy which would permit federal coal leasing only under specified, limited conditions pending review and analysis of federal coal leasing procedures. Affidavit of Secretary Morton, App. 120-121. On June 17, 1974, following the filing of an appeal from the decision of the district court, the Court of Appeals for the District of Columbia Circuit (Judges Leventhal and Tamm) denied respondents' motion for an injunction pending appeal because the requested injunction was too broad. However, the court noted that "the spectre of significant harm to large tracts of valuable wilderness still remains" and that permitting coal development activity in the region could allow "consequential and perhaps irreversible action to be taken." The court therefore urged that "substantial restraint be exercised in the granting of authority for coal development activity pending a disposition of this case on its merits." The court further granted respondents' motion to expedite the appeal. Br. Opp. App. A, pp. 2a-3a.

After a *sua sponte* remand to the district court to update the record and answer certain factual questions (Fed. Pet. App. C, pp. 81A-83A; Fed. Pet. App. E, pp. 103A-116A), the court of appeals heard oral argument on December 17, 1974. On January 3, 1975, it granted respondents' motion for a limited injunction to prevent the imminent approval of four mining plans and railroad rights-of-way. Fed. Pet. App. B, pp. 75A-80A.

On June 16, 1975, the court of appeals issued its decision on the merits of the case. It noted that numerous actions had already been taken by federal officials involving coal leases and water options to allow coal development in the Northern Great Plains and that hundreds of applications for coal leases and permits, water

options, mining plans, and right-of-ways were pending. Fed. Pet. App. A, pp. 5A, 8A-13A. While at the time of the court of appeals' decision the Secretary had announced a moratorium on further coal leasing except on a limited basis pending completion of the Northern Great Plains Resources Program study and of the national Coal Programmatic environmental statement (*id.* at 6A-8A), the court was nonetheless aware of the activities of other federal agencies in the region (*id.* at 8A), of the "loopholes" in the announced restrictions which would allow further coal development in spite of the apparent moratorium (*id.* at 9A-11A), and of the likelihood in the near future of a "flood of applications" for mining leases, mining plans, rights-of-way over federal lands, navigable waterways, and national forests, and for water rights throughout the Northern Great Plains (*id.* at 13A). Once the pending studies were completed, "the massive development of the Northern Great Plains will begin." *Ibid.*

Looking at these federal activities, the court of appeals reached two major conclusions. The first was that the cumulative effect of the many federal decisions, interrelated in terms of purpose, geography, and environmental impact, amounted to a de facto federal program for coal and energy development. The court specifically rejected the argument of the federal petitioners, "that a statement is required only when the Government has itself designated the activities at issue a 'program.'" *Id.* at 28A. The court refused to allow the application of NEPA to depend on the label chosen by the government: "[w]hether a comprehensive impact statement is required cannot turn simply on whether the agency has denominated a comprehensive series of actions a 'program.'" *Ibid.*

The second conclusion was that the government itself had for some years treated the Northern Great Plains

region as a discrete area in terms of coal development, had acknowledged the need for comprehensive study and planning in the area, and had recognized the need for the federal government to control development. *Id.* at 34A-38A. The court reviewed the numerous statements of high federal officials calling for comprehensive regional development of the Northern Great Plains and the several studies of the region which had been undertaken for this purpose. *Ibid.* The most recent, and most comprehensive, study undertaken by the Department of the Interior, the Northern Great Plains Resources Program, had been initiated to avoid "engaging in single-purpose studies which are incapable of developing comprehensive information or by taking piecemeal actions which restrict our future options." Memorandum of Secretary Morton, June 30, 1972 (App. 130), quoted at Fed. Pet. App. A, p. 6A. The court of appeals concluded that the combination of the government's own treatment of the region with the multitude of federal actions there, past and anticipated, resulted in a de facto program and a regional major federal action within the meaning of NEPA. Fed. Pet. App. A, p. 39A.

Having determined the need for an environmental statement and its necessary scope, the court of appeals then turned to the next question, that of the appropriate timing. *Id.* at 42A. The court said that "[p]reparation of a statement must precede, or at least accompany, preparation of the recommendation or report on the proposal, so that the agency may have the opportunity to assess the environmental impact of its plans before committing itself, even tentatively, to action." *Id.* at 42A. The court then set out four criteria for determining whether the federal action at that time was ripe for preparation of an impact statement. *Id.* at 43A. Two of these, the availability of information on the effects of

implementing development and the severity of environmental effects caused by such development, the court concluded were satisfied. However, the immediate role of the government was not so clear, in light of the moratorium established by Secretary Morton and the imminent completion of the Northern Great Plains Resources Program. Therefore, the court remanded the case to the district court to allow the federal petitioners the opportunity, after issuance of the Northern Great Plains Resources Program report, to decide upon the role they would play in the region and whether they must prepare a comprehensive environmental statement. *Id.* at 47A-49A. Thus, the question of the appropriate time for an impact statement was left to depend on the decision concerning further action which the government would make.

At the same time as it decided the merits, the court of appeals continued the temporary injunction of January 3, 1975, in order to "preserve, in large part, the *status quo*" pending the federal petitioners' decision whether to prepare a comprehensive impact statement for the Northern Great Plains. *Id.* at 50A-51A. On November 7, 1975, the court of appeals denied the motions of the federal and AEP petitioners to dissolve the temporary injunction and, at the same time, remanded to the district court respondents' motion to modify that injunction in order to prevent approval of the proposed mining plan for the Amax mine in the Eastern Powder River Coal Basin of Wyoming. Br. Opp. App. B, pp. 4a-5a. On November 11, 1975, the Secretary of the Interior decided that the Amax mining plan would be approved. On November 14, 1975, the district court enjoined that approval only insofar as it extended beyond a period of two years or the final resolution of this litigation. Br. Opp. App. C, pp. 6a-7a.

By order entered January 12, 1976, this Court granted the petitions for writ of certiorari and the motion filed

by the federal petitioners for a stay of the injunction entered by the court of appeals.

Factual Background

Present Character of the Northern Great Plains. One of the world's largest known coal basins, the Fort Union and Powder River coal formations, underlie large areas of northeastern Wyoming, eastern Montana, western South Dakota, and western North Dakota.[3] The federal government owns or controls more than 60 percent of the estimated total coal reserve in the Northern Great Plains region.[4] In addition to the reserves under direct federal control, considerable coal is found on Indian lands which may be leased only with the approval of the Secretary of the Interior. Further, because of the checkerboard pattern of surface and subsurface ownership throughout much of this region, decisions of the federal government to lease or not lease will often effectively determine the future of adjacent private lands as well. The federal government thus has control over most of the coal reserves of the region, regardless of ownership.[5]

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[3] Final Environmental Impact Statement: Proposed Federal Coal Leasing Program, p. 2-48 (1975) (hereafter Coal Programmatic EIS).

[4] Effects of Coal Development in the Northern Great Plains, Report of the Northern Great Plains Resources Program, p. 8 (1975) (hereafter NGPR Program Report). A copy of this report has been lodged with the Clerk of this Court. This report, which was earlier considered to be an interim report, was prepared over a period of 3 years by a staff consisting of officials from a variety of federal agencies. The final report will be not prepared because Secretary Kleppe abolished the program in January 1976.

[5] The Bureau of Land Management of the Department of the Interior states that "the Federal Government influences the development of nearly 80 percent of all western coal resources." Program Decision Option Document, The Proposed Federal Coal Leasing Program, December 16, 1975, p. 3 (hereafter PDOD). A copy of the PDOD has been lodged with the Clerk of this Court.

The Northern Great Plains region presently has very little industry and a sparse population.[6] Much of the area is isolated from main highways or railroads and most of the present population derives its livelihood from ranching and farming. The region is well known for its abundant wildlife and fish and it has attracted increasing numbers of people who admire the beautiful scenery and utilize the superior opportunities for hunting, fishing and other outdoor activities.[7]

The present character of the Northern Great Plains region is described in the NGPR Program Report (pp. 45-47, 99):

> Most of the portion of the NGP area encompassed by this study is characterized by broad horizons of open, rolling terrain.
>
> * * * *
>
> It is a country of wind. Wind that quickly dries soils and drifts snow during the blizzardy winters. It is a dry country; only 2 percent is covered by the waters of lakes and streams. Annual precipitation ranges from 10 to 26 inches. Much of plains region only receives 12 to 16 inches of precipitation in a year. * * * [O]ut of 37 years, 1 had been humid, 1 moist subhumid, 5 dry subhumid, 25 semiarid, and 5 arid. The arid and some of the semiarid years are probably too dry to permit revegetation of disturbed land without irrigation.
>
> The NGP is a land of big cattle and wheat ranches. * * * Seventy percent of the area is pasture and range; 26 percent is cultivated for wheat, barley, flax, rye, oats, corn, alfalfa, and sugar beets, but

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[6] NGPR Program Report, p. 45.

[7] Bureau of Land Management, Powder River Basin Resources Briefing Report (May 1973), p. 5 (hereafter Powder River Basin Report.

"wheat and meat" are the main agricultural products. In 1971, a little less than one-twelfth of all U.S. wheat was produced in the region. Less than 3 percent of the land is irrigated.

There are few people, only 4.4 per square mile, compared with Iowa and Ohio having 52 and 263 persons per square mile respectively. * * * There are Indians: the Sioux, the Northern Cheyenne, Crow, Assiniboine, Gros Ventre.

* * * *

Some 2.5 million acres of the 92 million acres that comprise the NGP study are inventoried as "wild lands," some have potential for inclusion in the National Wilderness System.

* * * *

The big game of the NGP are another resource of national significance. * * * Hunting is a part of the NGP culture, with many nonresidents participating in the activity. * * * The high quality of hunting found in the NGP is directly related to the relatively low pressure of hunting on game populations and the millions of acres of relatively unaltered land surface that provides suitable habitat. * * *

Other kinds of recreationists visit the NGP as they move to areas on its fringes, such as Yellowstone National Park or the Black Hills. The Badlands in Theodore Roosevelt National Memorial Park, for example, attract large numbers of visitors to its unique scenic features.

All these resources are important to many more people than just those of the region. They are national resources, and many are the last vestiges of what this country once was in its untouched natural state.

* * * *

The NGP region is relatively free of large-scale air pollution problems. Extremely clean air is a trade-

mark. Visibilities of 50 miles or more are commonplace. "Big Sky" is more than the motto of a single State—it is a concept treasured by all people who live in the region and one quickly grasped by visitors.

The court of appeals well summarized the present status and the potential effects of intensive coal development on this region (Fed. Pet. App. A, p. 45A):

> Briefly put, a region best known for its abundant wildlife and fish, and for its beautiful scenery, a region isolated from urban American, sparsely populated and virtually unindustrialized, will be converted into a major industrial complex.

Past and Pending Federal Actions in the Northern Great Plains. The presence of enormous amounts of coal in the Northern Great Plains region, much of it close to the surface and therefore readily removed by surface mining techniques, concentrated in one geologically definable area, has attracted a rush to use this resource for highly intensive energy development. The federal government has already undertaken a large number of actions in the Northern Great Plains area in furtherance of this coal and energy development. Fourteen federal coal leases covering 90,000 square miles, issued prior to the effective date of NEPA, are presently operating.[8] Since that effective date, January 1, 1970, 29 coal leases, covering 137,802 acres, have been issued; 97 prospecting permits, which give the prospector the automatic right to obtain leases so long as "commercial quantities" of coal are found, covering 685,280 acres have been of coal are found and which cover 685,280 acres have been granted and water-option contracts for 601,000 acre-feet

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[8] Fed. Pet. App. A, p. 5a, note 4.

[9] Answers of Secretary Morton to Plaintiffs' Interrogatories, Ct. of Appeals App. 49-50; Supplemental Answers of Secretary Morton,

authorizing strip mining had been approved prior to the court of appeals' decision [10] and a fifth, for an extension of the Amax mine in northeastern Wyoming, was approved in November 1975.[11] Subsequent to the action of this Court staying the injunction imposed by the court below, four more mining plans were approved in February 1976.[12]

The Department of the Interior has recently announced that it will cease granting coal prospecting permits which give the right to a lease.[13] However, the Department presently has before it some 80 preference right lease applications based on existing permits [14] which the Secretary states "must be acted upon." [15] In addition, as of November 1974, there were 47 outstanding prospecting permits, covering some 3 billion tons of coal.[16] There are also pending some 42 competitive lease applications, 19 applications for coal-related rights-of-way, 41 applications for water option contracts, and two applications for permits for structures in navigable rivers.[17] The Department of the Interior has stated that it has a list of "over 80 parties

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Ct. of Appeals App. 149-156; Exhibit 1 to Federal Defendants' Motion for Summary Judgment, Ct. of Appeals App. 173-188.

[10] Fed. Pet. App. A, p. 10a, note 13.

[11] Br. Opp. App. C, p. 7a.

[12] Fed. Br. 21.

[13] Department of the Interior News Release, January 26, 1976, AEP Br. App., pp. 2a, 7a.

[14] Fed. Pet. App. A, p. 12A.

[15] Testimony of Secretary Kleppe before the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee, p. 9 (see App. B, p. 9a below).

[16] App. 159.

[17] Fed. Pet. App. A, pp. 8A-9A, including notes 7, 8 and 9, 12A-13A.

that are interested in obtaining Federal coal leases, primarily in the Northern Great Plains." [18]

Potential Development in the Northern Great Plains. The Report of the Northern Great Plains Resources Program describes the potential coal and coal-related development in the region.

It analyzes the future of the area in terms of three possible scenarios, called Coal Development Profiles, each reflecting a different rate of energy development in the area. The middle scenario, based on projections made by the Department of the Interior in 1972, envisions by the year 2000 the establishment of 24 export coal mines, 25 electric power plants with a capacity of 20,000 megawatts, and 16 synthetic natural gas plants.[19] Total coal production will be 362 million tons, which is over half of total present production in the entire country.[20] The consumption of water, a crucial consideration in this semi-arid to arid area, ranges from a low use estimate of 139,000 acre feet/per year to a high use estimate of 843,000 acre feet for the moderate projection.[21] The conservatism of these estimates is shown by the fact that, as of August 1975, the Bureau of Mines already listed 34 specific mines and 20 specific coal conversion plants proposed to be established by 1980.[22] In addition, as of October 1974,

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[18] Answers of the Secretary to Questions Submitted by the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee in connection with the hearing held February 16, 1976, Answer #77 (hereafter Answers of the Secretary).

[19] NGPR Program Report, p. 40.

[20] *Ibid;* Coal Programmatic EIS, p. 1-25.

[21] NGPR Program Report, p. 41.

[22] Subcommittee to Expedite Energy Development, U.S. Bureau of Mines, "A Listing of 43 Proposed, Planned or Under Construction Energy Projects In Federal Region VIII (August 1975) (hereafter "Bureau of Mines Listing").

there were already industrial water options in effect for over 700,000 acre feet, and option applications for 2,529,-000 acre feet per year.[23]

Thus it seems more likely that the estimates made in the high scenario are more realistic although even they may be too low.[24] This scenario envisions by 2000 the establishment of 64 export mines, 25 power plants with a capacity of 20,000 megawatts and 41 synthetic natural gas plants.[25] The range of water consumption is 343,000 acre feet to 1,593,000 acre feet per year.[26]

Other related developments are also expected in the Northern Great Plains. In order to provide the necessary quantities of water in this semi-arid region, the federal petitioners have proposed construction of a system of aqueducts, pumping plants, reservoirs and dams to divert water and convey it to the coal fields and power plants.[27] The electrical power generated by the power plants will be transmitted to major population centers over ultra-high voltage transmission lines.[28] Railroads, highways, water and slurry pipelines[29] will also be built to transport the coal and serve the additional population.[30]

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[23] NGPR Program Report, p. 71.

[24] See, *e.g.*, *id.* at 44, estimating expected coal production at just under the high scenario figure.

[25] *Id.* at 40.

[26] *Id.* at 41.

[27] *Id.* "Foreword"; Bureau of Reclamation, Appraisal Report on Montana Wyoming Aqueducts (1972) (hereafter Aqueduct Report).

[28] North Central Power Study, Phase I (1972), p. 19.

[29] The Bureau of Mines anticipates that approximately 1836 miles of slurry pipelines will be completed between 1975 and 1982. Bureau of Mines Listing, *supra*.

[30] Montana Coal Task Force, Situation Report on Coal Development in Eastern Montana (1973), p. 65; Aqueduct Report, pp. 27-28.

Estimates of the population increase in the region range from more than 245,000 new residents for the entire region (for the middle scenario of the NGPR Program)[31] to 300,000 to 400,000 in eastern Montana alone.[32] The lower estimates will mean an increase of over 30 percent in the next decade in contrast to the population growth of 1% during the decade of the 60s.[33] For the State of Wyoming alone, the State has estimated that population in the northeastern portion of the State, where the coal development is occurring, will expand from 56,100 in 1970 to 143,755 in 1990, a growth of 156 percent by contrast with a past average annual growth from 1950 to 1970 of slightly more than 1 percent.[34] The same study shows that in Campbell County, where many federal coal leases are located, the population will increase from 12,957 in 1970 to 56,969 in 1990, an increase of more than 400 percent in just twenty years.[35] The huge population increases will make it necessary to build new housing and expand the region's health, education, communication, recreation, sanitation, cultural, commercial, fire and law enforcement facilities.[36] The net result will be to change the region from an agrarian to an urban-industrial economy. The coal development of the Northern Great Plains region may well be the most massive industrial development of a rural area within a short period of time which has ever occurred in this country.

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[31] NGPR Program Report, pp. 40, 120.

[32] Montana Environmental Quality Council, First Annual Report (1972), p. 145 (hereafter Montana Environmental Council Report).

[33] NGPR Program Report, p. 120.

[34] Powder River Basin Report, p. 12 and Figure 4.

[35] *Id.*, Figure 5.

[36] *Id.* at 10; Montana Environmental Council Report, p. 145; Aqueduct Report, p. 26; NGPR Program Report, p. 129.

Environmental Impacts. The environmental impact of this vast coal development will be correspondingly enormous. The projected development of the region's coal resources will permanently destroy much of the region's environment by converting it into a major industrial complex. The large strip mines, mine-mouth electric and coal gasification plants, railroads, aqueducts, transmission lines and other installations related to this coal development will cause an enormous, adverse impact on land use, water supply, water and air quality, wildlife, aesthetics and other elements of the environment.

For example, it has been variously estimated that the land to be stripmined for this coal development will cover from 30 square miles per year—or a total of more than 1,000 square miles during the development's projected 35-year duration—to more than 3,000 square miles in northeastern Wyoming alone.[37] Federal and state studies show that no strip-mined land has yet been fully reclaimed and that the region's climate, low precipitation and thin topsoil make it extremely likely that much of it will not be successfully reclaimed.[38] A federal inter-agency task force has stated that "acceptable reclamation of these semi-arid lands has yet to be demonstrated." [39] The Bureau of Land Management has recognized the adverse

[37] Malde, U.S. Geological Survey, Denver, Colorado, Letter to Director, U.S. Geological Survey, April 24, 1972, pp. 2-3; Bureau of Land Management, Powder River Basin Report, p. 9.

[38] Montana Coal Task Force, Coal Development in Eastern Montana, p. 33 (1973) (hereafter Montana Coal Task Force Report); Montana Environmental Council Report, p. 143 (1972).

[39] Sulfur Oxide Control Technology Assessment Panel, Final Report on Projected Utilization of Stack Gas Cleaning Systems by Steam-Electric Plants, p. 69 (April 1973).

environmental impacts of this coal development in the Powder River basin in Wyoming: [40]

> About 21 billion tons [of coal] are strippable with 16 billion tons being on the east side of the basin in what is known as the Wyodak zone. This Wyodak zone outcrops and extends south for approximately 90 miles from a point about 20 miles north of Gillette which if developed for coal can result in a total disturbance in excess of 200,000 acres.
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> • • • •
>
> This procedure of [strip] mining will totally disrupt the existing ecosystem. Rehabilitation of this type of practice will not approach restoration.
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> • • • •
>
> The resultant boom with its enormous population pressures may cause more human resource problems than the ecological damage of strip mining itself.
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> • • • •
>
> C. Adverse Impacts That Cannot Be Avoided:
>
> The Overall Impact: The total impact of enabling the proposed railroad line for coal developement will transform large areas of the Powder River Basin into an abnormal, imbalanced ecosystem. Both plant and animal species, in disturbed areas will be either eradicated completely, displaced, or temporarily eliminated. Air and water quality will be lowered by material carried in suspension. The visual and noise pollution will continue until the energy resources are depleted. It is doubtful that the human impact as mentioned under impacts can be completely mitigated.

[40] Bureau of Land Management, Burlington-Northern Inc. Environmental Analysis Record: Proposed Railroad, Douglas to Gillette Wyoming (August 1973), pp. 2, 5, 7-8 (hereafter Burlington-Northern Environmental Analysis).

Another report of the Bureau of Land Management has found: [41]

> Mining activities may, particularly in the breaks areas, trigger large scale movements of fragile soils. The thin productive soil mantle which maintains the vegetative cover in many areas will be degraded. Removal of natural vegetative cover in strip mine operations may be irreversible. The most sophisticated reclamation procedures could not replace the natural soil structure nor would reseeding come close to duplicating the natural ecological composition.

In addition, a study of the Department of Agriculture has stated even more emphatically: [42]

> The impacts of strip mining on the soil of this area by current mining methods would be complete destruction.
>
> * * * *
>
> Strip mining of these lands by the currently used mining methods and machinery would destroy seven of the existing ecosystems in the area. * * *
>
> There is currently no technical nor projective evidence that rehabilitation of these ecosystems can be assured after strip mining * * *.
>
> * * * *
>
> It is doubtful that the native grazing lands can be reestablished.

In March 1974, the Department of the Interior told Congress, in response to questions about the rehabilitation of lands which have been strip mined, that "we must admit we cannot fully restore total ecosystems with today's technology." [43]

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[41] Powder River Basin Report, p. 10.

[42] Forest Service, Environmental Analysis Report, Request for a Competitive Coal Lease: Custer National Forest, pp. 49, 61, 68.

[43] Answers of Department of the Interior to Questions of the Subcommittee on Minerals, Materials, and Fuels of the Senate Committee on Interior and Insular Affairs, Hearings on Coal Leasing in Northern Great Plains, March 13, 1974, Answer to Question 14.

The region's water supply will also be seriously affected. A study of the National Academy of Sciences has found: [44]

> The potential environmental impact of water usage implied by the scale of surface mining operations combined with proposed energy conversion projects in the western region is staggering. * * * Such a diversion represents a significant fraction of the major river flow in the project region and could well result in very substantial environmental impacts over large areas of watershed.

More recently in 1974, Governor Judge of Montana stated that the industrial demands for water from the Yellowstone River relating to coal development already exceed the amount projected to be needed by the year 2000, that more requests are expected, and that this demand will leave no additional water available for agricultural uses.[45]

Ground water supplies will be seriously affected by the removal of coal formations which serve as the region's principal aquifers.[46] The National Academy of Sciences has concluded that "surface mining activities may disrupt ground water flow patterns and interrupt traditional sources of water supply. These direct and indirect consequences may be far more important than the ability to rehabilitate the actual site of the mining and should guide decisions regarding regional development." [47]

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[44] National Academy of Sciences, Rehabilitation of Western Coal Lands (1973), pp. 22-23.

[45] Billings Gazette, March 23, 1974.

[46] Montana Environmental Council Report, pp. 143-144.

[47] National Academy of Sciences, pp. 22-23.

Water quality in the region will be degraded. Toxic mining spoils threaten to pollute ground water supplies.[48] Strip mining promotes erosion and increases the sedimentation of streams.[49] The Bureau of Land Management has concluded: [50]

> Watershed impacts of mining will have major effects on the basin's hydrologic system. The Powder River, the major drainage, can't under present conditions flush its sediments.

Similarly, once the proposed coal-burning power plants begin operation at their enormous generating capacity, the region's air quality—now almost pure and containing little industrial pollution—will be seriously degraded.[51]

There will be other major environmental impacts as well. The Bureau of Land Management has found that serious damage to wildlife will occur: [52]

> The modification of wildlife habitat resulting from concentrated development and human activity will affect virtually all wildlife species to a certain degree. For some the effects could be serious.

Another Bureau of Land Management report notes that "[b]oth plant and animal species, in disturbed areas will be either eradicated completely, displaced, or temporarily eliminated" and that "visual and noise pollution" will result.[53]

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[48] NGPR Program Report, pp. 91-92; Montana Environmental Council Report, p. 144.

[49] NGPR Program Report, p. 91; Montana Coal Task Force Report, p. 51.

[50] Power River Basin Report, p. 10.

[51] See, *e.g.*, Final Environmental Impact Statement, Eastern Power River Basin, p. I-647a.

[52] Power River Basin Report, p. 10.

[53] Burlington-Northern Environmental Analysis, p. 7.

The increase in population will have enormous environmental effects. The Bureau of Land Management has found as to this impact in the Powder River Basin: [54]

> Major ecological, economic and social systems will be definitely affected by the scale of anticipated development in the basin. Most all present uses, resources, municipalities, and even the general way of life will be forced to change.
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> * * * *
>
> The traditional life style of many ranchers will be violently disrupted. Most land-owners may be compelled to sell. It is unlikely that these original operators will resume the livestock operations after mining has taken place. There is a great danger in temporarily changing an agricultural economy to a boom type of economy based on mining. The result may be an inability to recover and return to a successful agricultural base.

The Bureau has further confirmed the seriousness of this impact: [55]

> The resultant boom with its enormous population pressures may cause more human resource problems than the ecological damage of strip mining itself.

A Montana state study has found: [56]

> The increased tax base is often temporary in the case of coal mining and coal-related industry. Unless reclamation is unusually successful and the land is restored to a productive condition, strip mining destroys the base: when the coal is depleted and the power companies move their plants closer to new fuel supplies, spoilbanks have little tax value. The present standard of living in the Appalachian coal

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[54] Powder River Basin Report, p. 10.

[55] Burlington-Northern Environmental Analysis, pp. 7-8.

[56] Montana Coal Task Force Report, p. 19.

fields demonstrates the long-range economic impact of indiscriminate mining. The coal and power companies have departed, leaving the people with no jobs and the government with nothing to tax. With exhaustion of Montana's coal reserves, a similar situation would almost certainly develop: The lifetime of proposed generating facilities for Montana coal development is estimated to be about 30 years.

The Bureau of Land Management has said that "boom town" development in the region has already become apparent: [57]

> A local social psychologist calls this the "Gillette syndrome" after a local boom town. This is a social system of higher rewards and greater pains that accompany an industrial boom. It includes the three A's: alcohol, accidents and absenteeism, as well as the three D's: divorce, delinquency and depression. These results become social costs and are very significant in both terms of human misery and dollars. For example, Gillette, Wyoming with 8,000 people during a four year boom period averaged one suicide per week; this is 10 times the national average. This town also has one of the highest delinquency rates, high school dropout rates and divorce rates in the Nation.

The Northern Central Power Study was initiated in 1970 by the Department of the Interior in order to: [58]

> investigate the potential of electric power in the north central United States. The geographic scope of the study included all or portions of twelve states and minor portions of three other states.

This study was terminated in 1972 after publication of a Report on Phase I of the study.[59] The Department of

[57] Powder River Basin Report, p. 11.

[58] Affidavit of Secretary Kleppe, App. 190.

[59] North Central Power Study, Report of Phase I, Volume I.

the Interior also suspended in 1972 a study it had undertaken to examine "the availability of water resources in southeastern Montana and northeastern Wyoming for the development of the vast coal resources in the region." [60]

The district court found that the North Central Power Study was evidence of efforts by the Department of the Interior "to investigate the potential for coordinated development of electric power supply in the north central United States." [61] The district court found that the Montana-Wyoming Aqueducts Study was evidence of efforts by "the Department of the Interior to control development of coal on a national basis, including the Northern Great Plains." [62]

In June 1972 then Secretary Morton initiated a study of the Northern Great Plains region, pointing out that: [63]

> The vast reserves of coal in the Fort Union Region of Montana, North Dakota, South Dakota and Wyoming provide an excellent opportunity for this Department to demonstrate how a responsible Federal agency can manage resource development with proper regard for environmental protection. It is important that we not lose this opportunity by engaging in single-purpose studies which are incapable of developing comprehensive information or by taking piecemeal actions which restrict our future options.

The resulting Northern Great Plains Resources Program, which was jointly undertaken by the Departments of the Interior and Agriculture, the Environmental Protection Agency and the State governments, studied a geographic

[60] Aqueduct Report, Foreword.

[61] Fed. Pet. App. 89A.

[62] Fed. Pet. App. 90A.

[63] Memorandum of Secretary Morton, June 30, App. 130.

area of 63 counties in eastern Montana and Wyoming and western North and South Dakota. After a report was issued in August 1975 the program was terminated in January 1976.[64] Neither that Program nor any federal agency has prepared an environmental impact statement for the region as a whole.

An environmental impact statement has been prepared on the Eastern Powder River Coal Basin, which covers the approval of four mining plans and the proposed railroad line between Gillette and Douglas, Wyoming.[65] This statement also purports to analyze on a comprehensive basis a small portion of the Northern Great Plains, namely the Eastern Powder River Coal Basin in northeastern Wyoming. This basin is a part of the coal development area in northeastern Wyoming described in the complaint and studied by the Northern Great Plains Resources Program.

Moreover, even though federal agencies have taken numerous actions regarding coal development in the Northern Great Plains since the effective date of the National Environmental Policy Act (January 1, 1970), few environmental impact statements have been prepared on these individual actions. No environmental impact statement has been issued on any of the coal leases awarded since 1970.[66] Similarly, no environmental state-

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[64] Secretary Kleppe, Letter of January 29, 1976, to Senator Metcalf, attached to the Secretary's Response to Questions of the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee.

[65] This statement has been lodged with the Clerk of this Court by the federal petitioners.

[66] The Court of Appeals for the Ninth Circuit has ruled that the failure to prepare an environmental impact statement for a large federal coal lease in the Northern Great Plains which was approved after January 1, 1970, violated NEPA. *Cady* v. *Morton*, 527 F.2d 786 (C.A. 9, 1975). It is respondents' understanding that a statement is now in preparation on the leases involved in that case.

ment has been prepared as to any of the water option contracts, despite the great importance of water supply in the area. No environmental statement has been prepared on any of the coal prospecting permits, in spite of the Department of the Interior's position that such permits must lead to the award of a lease so long as "commercial quantities" of coal are found. The only environmental impact statements have been prepared for mining plans for seven mines as to which the leases had already been awarded and for authorization of the railroad line between Gillette and Douglas, Wyoming.

In addition, two draft environmental impact statements have recently been issued. One involves a mining plan for the Cordero coal mine in the Eastern Powder River Basin of Wyoming and the second involves a proposed reservoir on the Middle Fork of the Powder River also in Wyoming.[67] The reservoir waters are partly intended for agricultural use, but much or most of the water is expected to be used for coal gasification or another industrial use, such as coal liquefaction, coal fired steam electric generation, or slurry pipeline.[68]

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[67] U.S. Geological Survey, Draft Environmental Statement for the Proposed Plan of Mining and Reclamation, Cordero Mine, Sun Oil Company, Coal Lease 8385, Campbell County, Wyoming, DES 75-65 (December 1975); Bureau of Land Management, Draft Environmental Impact Statement for the Proposed Reservoir on the Middle Fork of Power River, DES 76-5 (January 1976).

[68] The Department of the Interior has also prepared an environmental impact statement for the Federal Coal Leasing Program (often referred to as the Coal Programmatic), which considers federal coal leasing policy for the entire country. However, no federal actions other than coal leasing are considered. The Secretary of the Interior has recently described the Coal Programmatic (Department of the Interior News Release, AEP Br. App. 6a): "This statement is intended to be a general analysis of the environmental impacts of major leasing alternatives. It will not, however, satisfy the requirement for future site-specific or regional environmental analyses as individual coal-related actions are proposed."

SUMMARY OF ARGUMENT

I. Although the position of the Department of the Interior in this litigation superficially appears not to have changed since initiation of the suit, in fact the Department has now adopted the policy urged by respondents of preparing regional environmental impact statements to analyze related federal activities taking place in the same geographical area. This policy is currently being implemented as part of the new coal leasing policy announced by the Department of the Interior on January 26, 1976.

The Department has specifically applied this policy to the coal development in the Northern Great Plains. It has prepared one environmental statement of the type it now proposes to undertake, the Eastern Powder River Coal Basin Impact Statement principally covering one and one-half counties in Wyoming. The Department plans to do four additional environmental statements on subportions of the Northern Great Plains region.

The Department's adoption of regional environmental statements as the means for satisfying the requirements of NEPA for full, comprehensive analysis of the environmental impacts of major federal actions apparently stems from the Department's realization, voiced recently by the Secretary of the Interior, that "mining coal from one or more leases might have substantial broader significance than the direct impact of the particular lease operations and may set the course of development for geographic areas encompassing both Federal and non-Federal lands." Testimony of the Secretary before the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee, February 16, 1976 (App. A, p. 3a below). In the course of that same hearing, the Secretary and the Solicitor of the Department of the Interior admitted that the only dispute remaining be-

tween the Department and the respondents herein concerned the size of the region which should be considered.

II. The decision of the Department of the Interior to prepare comprehensive regional environmental statements is consistent with the requirements of the National Environmental Policy Act, as expressed in the language of the statute, its legislative history, numerous judicial determinations, and the administrative practice of federal agencies.

A. If a regional environmental statement is required at all, it is clearly required at the present time. As this Court held in *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289 (1975), NEPA requires issuance of an environmental impact statement only at the time a federal agency makes a proposal or, if it makes none, only when it makes its determination. Here, the Department of the Interior has already taken a large number of actions to lease large areas for coal mining, to option water, and to approve mining plans which will foster intensive coal and coal-related energy development in the Northern Great Plains region. The approval of four mining plans occurred as recently as February 1976.

Unlike the situation presented to this Court in *SCRAP*, the federal activity triggering the NEPA process and requiring adequate analysis has gone far beyond the initial proposal stage. The award of federal leases for coal is a virtually irrevocable act, committing that resource and setting in motion all of the environmental, economic and social impacts which coal development will have. It is clear that a regional environmental statement must be prepared before or at least at the time of further federal actions.

B. The present position of the Department of the Interior concerning the scope of an environmental impact statement is consistent with the requirement of the National Environmental Policy Act that federal actions

which are related and have cumulative effects far beyond the impact of a single project must be the subject of an appropriate environmental analysis. Section 102(2)(C) and (D) of NEPA require that specific subjects be analyzed in detail in environmental impact statements. When federal agencies take numerous related actions, these subjects can be adequately analyzed only if a comprehensive environmental impact statement is prepared.

Numerous federal decisions interpreting NEPA require that related federal actions should be considered in a comprehensive environmental impact statement. These decisions are consistent with this Court's determination in *SCRAP* that the scope and content of an environmental statement depend on the kind of federal action involved. Here, the numerous related federal decisions, which are final in every respect and will have enormous environmental effects, require preparation of a comprehensive environmental statement.

The preparation of comprehensive impact statements accords with the policies and practices of virtually all federal agencies. The Council on Environmental Quality has issued guidelines which require comprehensive statements when federal actions are geographically, environmentally or programmatically related. 40 C.F.R. 1500.6. Numerous agencies have included the preparation of comprehensive statements in their formal regulations and customary practice. They have recognized the value of such comprehensive analysis and consideration to the carrying out of NEPA.

C. The actions being taken by the federal petitioners concerning coal development in the Northern Great Plains are the kinds of related actions requiring a comprehensive environmental statement. The actions are geographically related because they all involve the Fort Union and Powder River coal formation.

The use of water, air and water pollution, population increases and other cumulative effects of the individual projects make them clearly related environmentally. For example, commitments of water for one project will have an inevitable effect not only on the available water supply for agriculture, wildlife, and recreation but also on the feasibility of other projects which will need the same water. Air pollution produced by one facility will mingle with that from many others.

The various federal actions are also programmatically related. The Department of the Interior has recognized this in several studies, culminating in the Northern Great Plains Resources Program. This program was developed because the Department of the Interior specifically recognized the need to coordinate and control development in the region.

It is impossible to carry out the specific requirements of Section 102(2)(C) to analyze the effects and alternatives of federal actions except on a comprehensive, regional basis. The cumulative effects of all the projects must be analyzed concerning water usage, air and water pollution and many other important elements of the environment. Such basic alternatives as whether western coal is economically and environmentally preferable to eastern coal when shipped to eastern markets, whether strip mining should be concentrated in that portion of the region where reclamation is most likely, and whether railroad transportation is preferable to slurry pipelines can only be analyzed on a regional basis.

Those agencies charged by the Congress and the Executive with primary responsibility for overseeing the proper function of the National Environmental Policy Act and of furthering its goals, the Council on Environmental Quality and the Environmental Protection Agency, have specifically concluded that NEPA requires the Department of the Interior to prepare a comprehensive re-

gional environmental statement on coal development in the Northern Great Plains. This interpretation of the Act, by agencies charged with the responsibility of enforcing it, is of course entitled to great weight.

III. The appropriate region for a regional environmental impact statement concerning coal development in the Northern Great Plains is northeastern Wyoming, eastern Montana, and the western Dakotas. This area was not defined by respondents; instead, it is the precise area of the Fort Union and Powder River coal formations. Consequently, the Department of the Interior itself has repeatedly recognized this region as the appropriate one for comprehensive environmental analysis. The Northern Great Plains Resources Program, the federal government's major study of the region encompassed the same area. Moreover, any subregional analysis prevents consideration of the cumulative impact of development as to water supply, air and water pollution, and increased population. The Department of the Interior's belated decision to divide the Northern Great Plains into regions is therefore inconsistent with its duties to carry out adequate environmental analysis under NEPA and is invalid.

IV. Even if the Department of the Interior's decision to do environmental statements on subregions of the Northern Great Plains complies with NEPA, further federal action may not be taken without preparation of adequate subregional statements. Since subregional statements have not been prepared outside of the Eastern Powder River basin, major federal actions concerning coal development cannot be taken in those areas until a subregional statement is completed. The Secretary of the Interior has explicitly recognized this principle.

In addition, the Powder River environmental statement is clearly inadequate as a subregional statement because of its complete or almost complete failure to discuss the basic alternatives involved in coal development. However, since the adequacy of the statement has not been litigated in this case, it is plainly not appropriate for determination by this Court. Consequently, either this issue should be remanded to the district court or respondents should be left free to raise it in separate litigation.

ARGUMENT

The petitions for writ of certiorari in these cases presented the question whether the National Environmental Policy Act required preparation of a regional environmental impact statement relating to coal development in the Northern Great Plains. That issue is of extremely great importance to the administration of NEPA. It involves whether the Act requires federal agencies to prepare comprehensive environmental statements on a programmatic or regional basis if a number of their actions are related.

We submit, however, that that important question is no longer fairly before this Court. While the brief of the federal petitioners (as well that of the industry petitioners) is still devoted to this question, the Department of the Interior has adopted a policy, pursuant to the National Environmental Policy Act, of preparing regional environmental impact statements whenever it is taking a number of actions in the same geographical area. Moreover, it has specifically applied this policy to the coal development in the Northern Great Plains region.

In short, the Department of the Interior has adopted the position of respondents in this litigation. The only remaining controversy appears to be that the Department of the Interior has determined that the appropriate scope for the regional statements which are prepared is subsections of the Northern Great Plains region. We therefore believe that the correctness of this determination is the only issue now before this Court.

We will show below that the Department of the Interior has adopted the position advanced by respondents in this litigation that regional environmental statements must be prepared, pursuant to the National Environmental Policy Act, before a federal agency takes a number of related actions in the same geographical area and has specifically applied this policy to the coal development in the Northern Great Plains region. We will further show that the Department of the Interior properly construed the National Environmental Policy Act and this Court's decision in *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289 (1975) (hereafter SCRAP II), in deciding both that a regional environmental statement was required and in determining that the time was already ripe for preparation of such a statement concerning coal development in the Northern Great Plains.

We will then discuss the only present disagreement between the Department of the Interior and respondents —the scope of the area which should be considered in a regional statement. The Department of the Interior claims that five subsections of the Northern Great Plains are the appropriate areas for analysis in regional environmental statements. Respondents contend that the entire Fort Union and Powder River coal formations in northeastern Wyoming, eastern Montana, and the western Dakotas should be considered. Indeed, we will show that the Department of the Interior has itself always considered this the appropriate region for environmental analysis.

I.

THE DEPARTMENT OF THE INTERIOR HAS ADOPTED A POLICY OF PREPARING REGIONAL ENVIRONMENTAL IMPACT STATEMENTS WHEN SEVERAL FEDERAL ACTIONS ARE BEING CONSIDERED INVOLVING THE SAME GEOGRAPHIC REGION AND HAS APPLIED THIS POLICY TO COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS

The Department of the Interior has been gradually moving towards a policy which is in agreement with that of respondents in this litigation—that regional environmental impact statements should be prepared concerning related federal proposals involving the same geographical area. In testimony before the Subcommittee on Fisheries and Wildlife, Conservation and the Environment of the House Committee on Merchant Marine and Fisheries in September 1975, George L. Turcott, Associate Director of the Bureau of Land Management of the Department of the Interior, described the progress of the Department's adoption of regional analyses (National Environmental Policy Act Oversight, No. 94-14, 94th Cong., 1st Sess. 29, 30):

> Based on the court decisions and on the comments that we have received on both individual and program type EIS's, we have been considering the development of geographic area EIS's, starting with the geographic EIS now being prepared for BLM's livestock grazing program.
>
> Geographical area or regional EIS is one alternative to solving the problem of cumulative impacts assessments, and it would also cover current specific proposals.
>
> * * * *
>
> A brief statement about western energy development will highlight the complexity and multiplicity of

problems and issues we must address, and illustrate the possible use of regional program EIS's.

There are many existing and proposed energy related projects in the three-State area of Montana, North Dakota, and South Dakota. These include coal mining, coal gasification, powerplants, water developments, transportation systems, pipelines, and transmission lines.

These projects, to the extent Federal actions are involved, must meet NEPA requirements for environmental assessment and EIS's.

* * * *

The projects and related facilities require action by BLM, the Bureau of Reclamation, U.S. Geological Survey, the Bureau of Indian Affairs, the Fish and Wildlife Service, and others in Interior.

In addition, there will be interagency involvement with at least the U.S. Forest Service, the Environmental Protection Agency, the Federal Energy Administration and the Corps of Engineers. There may be more.

All this requires a carefully worked out strategy for preparing EIS's.

* * * *

We have authorized what we might call a geographic statement for all of northwest Colorado, involving several ongoing coal mines, in part on private land, and in part on public lands.

There are many new coal applications, with mammoth proposals for four-lane highways to serve this area, new towns, transmission lines, oil and gas pipelines. It is a very large complex.

Another official of BLM, Robert Jones, Chief of the Environmental and Planning Division, then described the BLM involvement in the Dakotas and Montana, pointing out that about 80 percent of the mineral resources in

North Dakota are under federal jurisdiction, and noting that 5 major energy complexes were being planned or were in various stages of development there. As he explained (*id.* at 31):

> This is the region you see here. These projects are interrelated. One project in the area might have acceptable environmental consequences, but, if you have border-to-border projects all the way across you have a substantially different environmental situation.

Subsequently, Secretary of the Interior Kleppe filed an affidavit in this Court stating (App. 194):

> * * * the Department has determined that, whenever possible, several proposals for federal actions in the same region will be covered by a single environmental impact statement rather than by multiple statements.

On January 26, 1976, the Secretary announced his decision to end the moratorium on federal coal leasing. In doing so, he adopted a number of new policies which are contained in the Executive Summary and Decision Document.[69] He decided with regard to environmental impact statements (*id.* at 18-1; App .B, pp. 20a-21a below):

> Where an EIS is required under NEPA for a particular Departmental action, whether that EIS will be a regional EIS or a site-specific EIS, will be determined according to the following principles:
>
> A. As a general proposition, and as determined by the Secretary, when action is proposed involving coal development such as issuing several coal leases or approving mining plans in the same region, such actions will be covered by a single EIS rather than

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[69] Both the Executive Summary and Decision Document and the Program Decision Option Document relating to the Federal Coal Program have been lodged with the Clerk of this Court. Relevant portions of the Executive Summary and Decision Document have been reproduced as Appendix B of this brief.

by multiple statements. In such cases, the region covered will be determined by basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries, areas of economic interdependence, and other relevant factors.

B. In areas where the Secretary has determined that a regional EIS is to be prepared, if an individual action requires approval prior to completion of the regional EIS and, in the case of leasing activities, meets the short-term criteria, an environmental analysis will be completed. If the environmental analysis indicates that the individual action is such an integral part of the regional action that its environmental effects cannot be properly considered unless the regional EIS is completed, that action will be held until completion of the regional EIS.

C. In all other cases, each coal lease or mining plan will be analyzed and an environmental analysis prepared to determine whether or not an EIS is required. If the environmental analysis indicates an EIS is necessary to comply with NEPA, a site-specific EIS, or *a regional EIS, if a series of proposed actions with interrelated impacts are involved, will be prepared* unless a previous EIS has sufficiently analyzed the impacts of the proposed action(s). (emphasis added)

In the news release accompanying his January 26th statement on the new federal coal leasing policy, the Secretary declared that the policy would include, among other steps, "preparation of regional environmental impact statements, wherein groups of coal and coal-related actions are proposed in a defined geographical area * * *." Department of the Interior News Release, January 26, 1976 (See AEP Br. App. 6a).

The Secretary's policy to prepare regional environmental statements has been specifically applied to the Northern Great Plains. The Program Decision Option

Document of the Bureau of Land Management ranked in order of priority 30 areas for possible regional environmental statements. Program Decision Option Document, The Proposed Federal Coal Leasing Program, December 16, 1975, p. 38. Four of the first ten areas are in the Northern Great Plains region: the Eastern Powder River in northeastern Wyoming (which has been completed), most of the remainder of the coal area in northeastern Wyoming not covered by the Eastern Powder River environmental statement, southeastern Montana, and western North Dakota. A fifth area in eastern Montana is involved in a later statement. These regional statements will almost complete regional analysis of the Northern Great Plains. Moreover, the Bureau of Land Management has proposed to begin the regional statement for western North Dakota in April 1976. Preliminary Statement, Preparation Plan for an Environmental Impact Statement on Energy Development in Western North Dakota (March 15, 1976).

The decision to prepare regional statements was reaffirmed by the Secretary of the Interior during his appearance on February 16, 1976, before the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee. In his prepared testimony, the Secretary stated (see App. A, p. 3a below):

> In some cases, mining coal from one or more leases might have substantial broader significance than the direct impact of the particular lease operations and may set the course of development for geographic areas encompassing both Federal and non-Federal lands. In such instances, as determined by the Secretary, the Interior Department will prepare a regional environmental impact statement before deciding to proceed. The region covered will be determined by basin boundaries, drainage areas, economic interdependence, and other relevant factors.

As an example of the type of regional statement the Department would henceforth prepare, the Secretary cited the Eastern Powder River Coal Basin Environmental Impact Statement [70] and the statement under preparation for the area in northwest Colorado (App. A, p. 12a).

The Secretary's prepared testimony further set forth the Department of the Interior's position concerning the present litigation. The Secretary stated that the Department differed with respondents in only two respects. First, he said that there was a disagreement over the size of the area to be considered in the regional statement (App. A, p. 12a below):

> The suit originally sought to enjoin further leasing actions and approval of coal mining plans within an area defined as the Northern Great Plains Region until such time as a Federal coal plan is devised for that region and an Environmental Impact Statement is prepared on that plan. As indicated earlier in this testimony, we intend, wherever necessary to complete regional Environmental Impact Statements, but of a different magnitude.

Then the Secretary described what he believed was the "real difference we have with the decision of the Circuit Court in the Sierra Club suit," erroneously claiming that the litigation involved the issue whether the Department of the Interior was required to prepare a regional plan for development (*ibid.*). While respondents believe that such a plan would indeed be extremely desirable and that regional planning probably is required by NEPA (see pp. 86-89 below), the complaint did not request the

[70] It had not previously in this litigation been claimed that the Eastern Powder River statement is a regional statement of the type petitioners have sought in this litigation. The court of appeals specifically found both that no such claim had been made and that that statement does not "comprehensive study the regional impact of coal development in the Northern Great Plains * * *" (Fed. Pet. App. A, pp. 10A-11A, note 15).

adoption of a regional plan as contrasted to regional analysis in an environmental statement and no such issue is before this Court.

In any event, it is clear that the Secretary did not claim that the Department of the Interior has any dispute with respondents' contention that a regional environmental statement is required as to coal development in the Northern Great Plains.

In the course of Secretary Kleppe's appearance before the Subcommittee, Senator Metcalf pressed the Secretary on the question of the cumulative impacts of the Department's activities in the Northern Great Plains (Transcript, Oversight Hearings on Federal Coal Leasing Program, Senate Interior Committee, February 16, 1976, p. 66):

> [T]he cumulative impact of the activities of the Secretary of Interior in these coal leasing regions is the regulation of resources and is the regulation and the control of the whole economic impact of these areas and what they want you to do and what we want you to do is to have some overall planning and not just go bit by bit and one at a time on leasing programs, but to have administration of the Northern Great Plains, insofar as your leasing policy is going to affect the resources so that we know what your overall policy is going to be.
>
> You can deny that you don't want to have any impact on the resources. But as a practical matter, with the vast amount of land that the Federal Government holds in the Western United States and the vast amount of coal land that is going to be mined, you're doing just exactly what you say you don't want to do * * *.

In response, the Secretary deferred to the Solicitor of the Department, who stated (*id.* at 67-68):

> We have admitted that we think there ought to be regional planning, but as opposed to this Sierra Club

> case, the Northern Great Plains case, we are not talking about a region that simply blankets a five state area. And that case did include Nebraska, Wyoming, North and South Dakota and Montana. But we are talking about regions that are defined more by drainage areas, basin boundaries and economic independence.
>
> So the Government's position should not be taken as one which resists planning on a regional basis. It is simpl[y], we feel, that a region should be defined because of the actual circumstances and conditions and not simply taking a large area of the United States without regard to the actual facts.

In sharp contrast to the position taken in the federal government's brief before this Court—that a single statement is required only "when a number of related projects logically form a single plan or proposal" (Fed. Br. 31, note 24)—the Department of the Interior plainly has concluded that a regional statement is required when the series of proposed actions has "interrelated impacts" (Executive Summary and Decision Document, *supra;* Appendix B, p. 21a below). Moreover, it has determined on this basis to do regional statements concerning coal development in the Northern Great Plains. We therefore submit that no controversy now exists between respondents and the Department of the Interior concerning the basic issue whether regional environmental statements must be done prior to federal actions concerning coal development in the Northern Great Plains.

II.

THE DETERMINATION OF THE DEPARTMENT OF THE INTERIOR TO PREPARE REGIONAL ENVIRONMENTAL IMPACT STATEMENTS IS CONSISTENT WITH THE NATIONAL ENVIRONMENTAL POLICY ACT AND THIS COURT'S DECISION IN SCRAP II

The petitioners challenge the decision of the court of appeals on two major grounds. First, petitioners argue that the time at which an environmental impact statement must be prepared is determined by the time when the government formally proposes action. Until there is an express federal "proposal," the petitioners claim there is no need for an environmental statement. Fed. Br. 24, 39-42; AEP Br. 25-28, 30-33. Second, federal petitioners argue that because the Department of the Interior has not "proposed a separate 'regional' plan," the only federal action is "either national or local in character" and no regional analysis is necessary. Fed. Br. 22, 23, 29-35. See also AEP Br. 33-35. This argument, which is also based on the alleged need for a "proposal," in fact goes to the question of the proper scope, rather than timing, of the environmental statement. For both of these propositions, petitioners rely in large measure on this Court's recent decision in SCRAP II.

As we have seen above, the Department of the Interior has resolved both of these issues. It has determined that regional environmental impact statements should be prepared on coal development in the Northern Great Plains and that the time for the preparation of these statements is prior to further federal action. We submit that these decisions are consistent with the National Environmental Policy Act and SCRAP II.

A. THE TIME IS RIPE FOR THE PREPARATION OF A REGIONAL ENVIRONMENTAL IMPACT STATEMENT

Petitioners contend that the National Environmental Policy Act does not require the preparation of a regional environmental impact statement until federal proposals for regional development have been made. Fed. Br. 24, 39-42; AEP Br. 25-28, 30-33. In doing so, they rely heavily on this Court's opinion in SCRAP II. We submit, on the contrary, that the only substantial issue in this case relates to the scope, rather than the timing, of the environmental impact statement.

There can be no serious question as to the timing of a regional statement in this case. The federal petitioners are not merely preparing actions in the future but have already taken numerous actions, including in the last few months, concerning coal development in the Northern Great Plains. The only question is therefore whether the federal agencies can continue to take actions without preparation of a regional environmental statement. The resolution of that issue depends upon whether the scope of the environmental analysis for particular federal actions can be confined to particular projects or must be done on a regional basis. As we will show below, it is clear that a regional environmental statement must be prepared which considers the cumulative effects of, and reasonable alternatives to, related actions in the same geographical area.

Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), states that the time for the preparation of environmental impact statements is when federal agencies make a "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment * * *." That Section further provides that the environmental statement "shall accompany the

proposal through the existing agency review processes." Thus, the language of NEPA is perfectly clear that environmental statements must be prepared at the time proposals are made by federal agencies and certainly by the time federal actions are taken.

This Court's holding in SCRAP II is fully consistent with this analysis. The Court found that "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action" (emphasis in original). 422 U.S. at 320. The Court then said that, "where an agency initiates federal action by publishing a proposal * * *, the statute would appear to require an impact statement to be included in the proposal * * *." *Ibid.* However, the Court found that in the ICC proceeding involved in SCRAP II, the environmental impact statement did not have to be prepared until the ICC made its decision (*ibid.*):

> [T]he ICC has made no proposal, recommendation or report. The only proposal was the proposed new rates filed by the railroads. Thus, the earliest time at which the *statute* required a statement was the time of the ICC's report of October 4, 1974 * * *. (emphasis in original)

The decision of the court of appeals in this case is fully consistent with the language of NEPA and this Court's decision in SCRAP II. The court of appeals did not hold that an environmental impact statement must be prepared for some uncertain future federal decision or action. On the contrary, the court of appeals specifically stated (Fed. Pet. App. A, p. 42A):

> We think it patent that the term "proposals" does not encompass every suggestion, however unlikely to reach fruition, made by a federal officer. Certainly federal officers are entitled to dream out loud without filing an impact statement. Thus, we think it

> proper to inquire, before an EIS is required, whether the proposal for action has progressed beyond the "dream" stage into some tangible form so that the time for an impact statement is ripe.

The court of appeals then stated: "Preparation of a statement must precede, *or at least accompany*, preparation of the recommendation or report on the proposal * * *" (emphasis added). *Ibid.*

Here, at the time that the court of appeals issued its opinion, federal agencies had already made numerous decisions concerning coal development in the Northern Great Plains. As we have seen above (pp. 11-12), the Department of the Interior, subsequent to the effective date of NEPA, had already issued 29 coal mining leases covering 137,802 acres, granted 97 coal prospecting permits covering 685,280 acres which confer the right to obtain leases, entered into water option contracts involving 601,000 acre-feet of water per year, and approved four mining plans. Hundreds of other applications were pending. Nevertheless, the court of appeals did not order that a regional environmental statement must be prepared because the federal government "has largely suspended activity" in the Northern Great Plains and "irretrievable commitments are largely being avoided." Fed. Pet. App. A, p. 46A. The court remanded the case to allow the federal petitioners and subsequently the district court to consider whether the federal agencies were proceeding further with devlopment so that a regional environmental statement would have to be prepared before further actions were taken. *Id.* at 49A.[71]

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[71] Both the federal and industry petitioners repeatedly state that the court of appeals held that an environmental statement was necessary if the Department of Interior was merely contemplating action. Fed. Br. 31-35; AEP Br. 24-25. The use by the court of appeals of the word "contemplating" in describing federal petitioners' conduct was appropriate at the time of the decision, when the moratorium on leasing imposed by Secretary Morton in 1973 was still in effect and the Department of the Interior did not appear on the verge of further action.

However, the court of appeals specifically held the very opposite of what the petitioners claim. It stated: "Our conclusion that major federal action is contemplated in the Northern Great Plains does not mean, ipso facto, that a comprehensive regional impact statement is required." Fed. Pet. App. A, p. 42a. It therefore remanded the case, even though it found that action was contemplated, to the district court to determine whether the time for preparation of the statement was ripe. It directed the district court, in deciding ripeness, to determine "[h]ow likely is the program to come to fruition and how soon will that occur." and "[t]o what extent are irretrievable commitments being made and options precluded." Fed. Pet. App. A, p. 43A.

We note that the Department of the Interior's own regulations provide that Section 102(2)(C) should "be construed with a view to the overall impact of the action proposed, *and of further actions contemplated*" (emphasis added). Manual Part 516, Ch. 2, Section .5.B, 36 Fed. Reg. 19344. CEQ's Guidelines likewise state that contemplated actions should be considered. 40 C.F.R. 1500.6(a); 38 Fed. Reg. 20551.

[72] There are presently 192 preference right lease applications, covering 9.3 billion tons of recoverable coal reserves, in 6 western

Since the court of appeals' decision, the federal petitioners have answered by their actions the questions remanded by the court of appeals. The Secretary of the Interior has approved five mining plans—one on November 11, 1975, and four more, after this Court stayed the injunction issued by the court of appeals in February, 1976.

The Secretary of the Interior has further made clear that he intends to proceed with federal actions in the Northern Great Plains. He has ended the moratorium on federal coal leasing, including in the Northern Great Plains. In announcing the new coal leasing policy, he has pointed out that "[i]t is obvious that these Federal coal deposits must be developed." Department of the Interior News Release. AEP Br. App. 3a. He has stated that existing preference right lease applications "must be acted upon." App. B, p. 9a below.[72] Ac-

cording to the Program Decision Option Document, p. 1, the proposed leasing program includes "processing of noncompetitive coal lease applications * * *" and "offering new lease tracts * * *." The same document suggests a time framework for proceeding with the coal leasing program, calling for industry nominations of leasing areas 30 days after the decision on the program and the holding of lease sales eight months after the date of decision. *Id.* at 39. Draft environmental impact statements have recently been issued for a 6,500-acre strip mine in the Eastern Powder River Basin of Wyoming and for a reservoir in the same area which is intended to serve two projected coal conversion plants. The Bureau of Land Management has ranked four major coal areas of the region as among the first for which "regional" statements will be prepared, terming them "high priority areas." Program Decision Option Document, pp. 37-38.

In these circumstances, we submit that there is no substantial question on the timing of a regional environmental impact statement. As we will show below, a regional environmental statement must be prepared when federal agencies are taking numerous related actions in a particular geographic area. If this contention concerning the scope of environmental statements is correct, a regional environmental statement must plainly be prepared no later than the time when federal agencies issue a lease, approve a mining plan, or take other action.[73] Since the federal petitioners have already taken numerous such actions and are preparing to take numerous

States. A large proportion of these applications are in the Northern Great Plains region. Department of the Interior News Release, February 23, 1976.

[73] Of course under the language of NEPA and this Court's decision in SCRAP II, if the federal agency makes a proposal prior to its decision, the environmental statement must be prepared at that time.

more, it is clear that a regional environmental impact, far from being premature, is considerably overdue. At the least, it must be prepared and considered before, or at the time, further federal actions are taken.

One of the reasons NEPA was adopted was to avoid step-by-step commitments of resources without comprehensive analysis and consideration. As the Senate report stated (National Environmental Policy Act of 1969, S. Rep. No. 296, 91st Cong., 1st Sess. 5):

> Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.
>
> Today it is clear that we cannot continue on this course.

We submit that the comprehensive environmental impact statement on related federal actions is the principal mechanism to carry out the essential purpose of NEPA.

B. THE NATIONAL ENVIRONMENTAL POLICY ACT REQUIRES PREPARATION OF COMPREHENSIVE ENVIRONMENTAL IMPACT STATEMENTS WHEN FEDERAL AGENCIES ARE TAKING A NUMBER OF RELATED ACTIONS

As we have seen above, the basic issue in this case, prior to the decision of the Department of the Interior to prepare regional environmental statements concerning coal development in the Northern Great Plains, concerned whether NEPA required that the federal petitioners prepare a regional environmental statement. The first step in this analysis is whether NEPA requires comprehensive environmental statements in situations where a number of federal actions are so related that the environmental impacts and alternatives must be analyzed on a broader basis than a statement on a specific project. We

will show in this section that the Act's language, legislative history, federal court decisions, and administrative interpretation all strongly support the requirement that comprehensive statements are required by NEPA in particular situations. We will then show in the next section (pp. 73-101) that the coal development in the Northern Great Plains is, as the Department of the Interior has itself concluded, the kind of situation involving closely related federal actions where such a comprehensive environmental statement is required by NEPA.

1. The Language of the National Environmental Policy Act and Its Legislative History Show That Related Federal Actions Must Be Considered in a Comprehensive Environmental Impact Statement

In adopting the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*, Congress recognized the historic failure of federal agencies to consider the effect of their decisions on the environment. Section 101(a) of NEPA, 42 U.S.C. 4331(a), states this recognition and declares a commitment on the part of the federal government "to use all practicable means and measures" to correct that failure and Section 101(b), 42 U.S.C. 4331(b), requires that the federal government "coordinate" federal activities to protect the environment. Section 102(2)(A), 42 U.S.C. 4332(2)(A), provides that federal agencies must "utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an effect on man's environment." Section 102(2)(G), 42 U.S.C. 4332(2)(G), requires that federal agencies "initiate and utilize ecological information in the planning and development of resource-oriented projects."

In order to implement the essential purposes of the Act, the Congress mandated in Section 102(2)(C), 42

U.S.C. 4332(2)(C), that federal actions "significantly affecting the quality of the human environment" be analyzed in a "detailed" environmental impact statement. The Act required that this environmental statement should analyze:

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Section 102(2)(D), 42 U.S.C. 4332(2)(D), emphasizes the importance of the requirements relating to alternatives by requiring that federal agencies "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."

We submit that the requirements of Section 102(2)(C) and (D) cannot be met when related federal actions are involved without preparation of a comprehensive environmental impact statement. We particularly emphasize the requirements relating to environmental impact (Section 102(2)(C)(i)), to adverse environmental effects (Section 102(2)(C)(ii)) and to alternatives (Section 102(2)(C)(iii)(D)). When a number of federal actions are closely related, the environmental impact and effects of one of them cannot be analyzed without considering the impact and effects of other related actions. Simi-

larly, if a federal action is related to other actions, the alternatives cannot be fairly analyzed unless all the related actions are considered.[74] Consequently, as we will describe below, the lower federal courts and numerous federal agencies, including the Council on Environmental Quality, the Environmental Protection Agency, and the Department of the Interior itself, have agreed that comprehensive statements are necessary to analyze adequately related federal actions.

2. Numerous Federal Court Decisions Have Held That the National Environmental Policy Act Requires That Related Federal Actions Must Be Considered in a Comprehensive Environmental Impact Statement

The federal courts have repeatedly held that comprehensive environmental impact statements must be prepared, pursuant to NEPA, when federal agencies take several related actions. In *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827, 835 (C.A.D.C. 1972), the court stated as to a sale of oil and gas leases:

> The scope of this project is far broader than that of other proposed Federal actions discussed in impact statements, such as a single canal or dam. The Executive's proposed solution to a national problem, or a set of inter-related problems, may call for each of several departments or agencies to take a specific action; this cannot mean that the only discussion of alternatives required in ensuing environmental-impact statements would be the discussion by each department of the particular actions it could take as an alternative to the proposal underlying its impact statement.

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[74] We will show below (pp. 73-101), in particular, that a regional statement of coal development in the Northern Great Plains is essential in order to analyze the impact, effects, and alternatives concerning this development.

> When the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broader.

Judge Leventhal then went on to explain (*id.* at 836):

> What NEPA infused into the decision-making process in 1969 was a directive as to environmental impact statements that was meant to implement the Congressional objectives of Government coordination, a *comprehensive approach to environmental management*, and a determination to face problems of pollution "while they are still of manageable proportions and while alternative solutions are still available" *rather than persist in environmental decision-making wherein "policy is established by default and inaction" and environmental decisions "continue to be made in small but steady increments" that perpetuate the mistakes of the past without being dealt with until "they reach crisis proportions."* S. Rep. No. 91-286, 91st Cong., 1st Sess. (1969), p. 5. (emphasis added)

The Court of Appeals for the First Circuit held in *Jones* v. *Lynn*, 477 F.2d 885, 891 (1973), that the preparation of environmental impact statements on individual buildings within an urban renewal project was not sufficient and that a comprehensive environmental impact statement was required:

> [I]t would not seem sensible to adopt the piecemeal approach which HUD seeks to adopt, whereby it will prepare a modified impact statement separately for each proposed construction as a mortgage insurance application is filed, an approach akin to equating an appraisal of each tree to one of the forest.
>
> • • • •
>
> If the district court is to properly carry out the NEPA mandate, it must, if the planning reveals an expectation of substantial further federal assistance,

> order HUD to conduct an environmental study of the entire Fenway program under 42 U.S.C. § 4332(2)(C) with the goal of determining what changes can still be made and, just as important, of informing the members of the community and the public what the environmental impact will be, what adverse effects cannot be avoided, and what irretrivable commitment of resources are involved when any plan is fulfilled.

Similarly, in *Greene County Planning Board* v. *FPC*, 455 F.2d 412, 420 (1971), certiorari denied, 409 U.S. 849, the Court of Appeals for the Second Circuit held that a "a single coherent and comprehensive environmental analysis" was required of an entire power project.[75]

In *Scientists' Institute for Public Information* v. *AEC*, 481 F.2d 1079 (1973), the Court of Appeals for the District of Columbia Circuit considered the issue, relating to the Liquid Fast Breeder Reactor Program, whether the Atomic Energy Commission "must issue [an environmental impact] statement for the research and development program as a whole, rather than simply for individual facilities * * *." *Id.* at 1085. Relying on the interpretation of CEQ (see pp. 62-64 below), the court found that "[t]he Commission takes an unnecessarily crabbed approach to NEPA in assuming that the impact statement process was designed only for particular facilities rather than for analysis of the overall effects of broad agency programs. Indeed quite the contrary is true." *Id.* at 1086-1087.[76]

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[75] This Court's disapproval of the *Greene County* decision in SCRAP II related to the question of the timing of the statement rather than its scope. 422 U.S. at 321, note 20.

[76] *Scientists' Institute* has been described by the Court of Appeals for the Ninth Circuit as a "leading case." *Friends of the Earth* v. *Coleman*, 513 F.2d 295, 299 (1975); *Cady* v. *Morton*, 527 F.2d 786, 795-796, note 9.

In *Chelsea Neighborhood Assn's* v. *U.S. Postal Service*, 516 F.2d 378 (1975), the Court of Appeals for the Second Circuit affirmed a lower court finding that an environmental impact statement was legally inadequate in failing to assess a likely future housing project to be undertaken by the City of New York and added to the facility planned by the Postal Service. The court pointed out (*id.* at 383):

> It is correct that the Service will not build the housing portion of this project, but even so, the Service cannot ignore it. If the potential impact of the housing is not considered before the VMF [Vehicle Maintenance Facility] is constructed, it will be too late to reassess the project as a whole no matter what is shown by a later EIS for the housing prepared by another agency.

In *Cady* v. *Morton*, 527 F.2d 786 (C.A. 9, 1975), a case which the Council on Environmental Quality has described as "almost a companion case to the *Northern Great Plains* decision * * *" (Environmental Quality—1975, 6th Annual Report of the Council on Environmental Quality, p. 646), the court of appeals considered the question of the proper scope of an environmental impact statement. There, an environmental statement had been prepared on a mining plan covering some 770 acres of strip mining, but none had been prepared prior to the decision of the Department of the Interior to approve the basic leases which covered an area of more than 30,000 acres. The court distinguished a number of cases, including its own earlier decisions[77] which

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[77] The court distinguished *Trout Unlimited* v. *Morton*, 509 F.2d 1276 (C.A. 9, 1974), *Environmental Defense Fund* v. *Armstrong*, 487 F.2d 814 (C.A. 9, 1973), *Friends of the Earth* v. *Coleman*, 518 F.2d 323 (C.A. 9, 1975), *Sierra Club* v. *Stamm*, 507 F.2d 788 (C.A. 10, 1974), *Sierra Club* v. *Callaway*, 499 F.2d (C.A. 5, 1974), and *Indian Lookout Alliance* v. *Volpe*, 484 F.2d 11 (C.A. 8, 1973. See 527 F.2d at 794, 795, notes 7 and 9.

the petitioners here have relied upon heavily, and stated (*id.* at 795):

> While it is true that each mining plan prepared for tracts within the leased area is to a significant degree an independent project which requires a separate EIS with respect to each, it is no less true that the breadth and scope of the possible projects made possible by the Secretary's approval of the leases require the type of comprehensive study that NEPA mandates adequately to inform the Secretary of the possible environmental consequences of his approval.

The court explained that "it cannot be denied that the environmental consequences of several strip mining projects extending over twenty years or more within a tract of 30,876.45 acres will be significantly different from those which will accompany Westmoreland's activities on a single tract of 770 acres."[78] *Ibid.* Thus, the crucial criterion for the scope of an environmental impact statement was deemed to be, as this Court found in SCRAP (see our discussion on pp. 58-60 below), the nature and effect of the particular federal decision.

In the recent case of *Natural Resources Defense Council* v. *Callaway*, 524 F.2d 79, (1975), the Court of Appeals for the Second Circuit considered the plaintiffs' claim that an environmental impact statement prepared for a particular Navy project to dredge and dump spoils in Long Island Sound was inadequate because of its failure to consider other pending proposals, some by other government agencies and at least one by a private

[78] The federal petitioners characterize (Fed. Br. 36, note 28) *Cady* v. *Morton* as holding that "the appropriate unit for environmental study is a single mining lease." That is inaccurate. The court ruled, agreeing entirely with the plaintiffs on this issue, that an environmental statement for a mining plan could not satisfy NEPA's requirement of analysis of the government's decision to approve the overall lease. The question of a regional statement was expressly not before the court in *Cady* since that issue was pending in the present litigation.

company, to dump spoil at the same site. The court ruled that the failure to analyze the cumulative effects of the proposals resulted in an environmental statement which "failed to furnish information essential to the environmental decision-making process." *Id.* at 87. While agreeing with the District of Columbia Circuit that NEPA does not require a "crystal ball" inquiry,[79] the court went on to caution that "agency may not go to the opposite extreme of treating a project as an isolated 'single-shot' venture in the face of persuasive evidence that it is but one of several substantially similar operations, each of which will have the same polluting effect in the same area." *Id.* at 88. The court continued (*ibid.*):

> As was recognized by Congress at the time of passage of NEPA, a good deal of our present air and water pollution has resulted from the accumulation of small amounts of pollutants added to the air and water by a great number of individual, unrelated sources.
>
> * * * *
>
> NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration. * * * The fact that another proposal has not yet been finally approved, adopted or funded does not foreclose it from consideration, since experience may demonstrate that its adoption and implementation is extremely likely.

Thus, although none of the other projects to dump had final approval, the court nonetheless held that (*id.* at 89):

[79] *Natural Resources Defense Council* v. *Morton*, *supra*, 458 F.2d at 837.

> [A]ll are well beyond the stage of mere speculation and should have been included in the Navy's analysis of environmental impacts. * * * Clearly, the projects are closely enough related so that they can be expected to produce a cumulative environmental impact which must be evaluated as a whole.

Numerous district court decisions have come to the same conclusion. In *Illinois* v. *Butterfield*, 396 F. Supp. 632 (N.D. Ill. 1975), one of the claims before the court was that the cumulative effect of a series of separate federal actions constituted a "major federal action" within the meaning of Section 102(2)(C) of NEPA. The court found that the claim properly stated "defendants' failure to prepare an impact statement with respect to the collective impact of certain actions as opposed to an impact statement for just particular actions." *Id.* at 640-641. The court then quoted from the CEQ Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements of May 16, 1972 (*id.* at 641):

> Individual actions that are related either geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single program statement. * * * The program statement has a number of advantages. It provides an occasion for a more exhaustive consideration of effects and alternatives than would be practicable in a statement on an individual action. It ensures consideration of cumulative impacts that might be slighted in a case-by-case analysis. And it avoids duplicative reconsideration of basic policy questions.

In *Natural Resources Defense Council* v. *Grant*, 355 F. Supp. 280, 288-289 (E.D. N.C. 1973), the district court held that the environmental impact statement on the Chicod Creek Watershed Project must "consider fully * * * the cumulative impact of [that project] and other channelization projects on the environmental and economic resources of Eastern North Carolina" including the "cumulative effect of sedimentation" and the "cumulative impact of drainage projects upon hardwood timber of groundwater resources."

In *Conservation Council* v. *Costanzo*, 398 F. Supp. 653 (E.D.N.C. 1975), the district court considered whether approval of the construction of a marina required preparation of an environmental impact statement. In ruling that such an analysis was necessary, the court noted that, "[u]nder applicable principles of law, the cumulative effects of any federal action must be considered in determining the significance of the impact of the federal action on the human environment." *Id.* at 672.

Finally, a recent decision of the District Court for the District of Columbia considered the adequacy of an environmental impact statement prepared to analyze the effects of moving the Naval Oceanographic Program from its present site in Maryland to Bay St. Louis, Mississippi. *Prince George's County* v. *Holloway*, 404 F.Supp. 1181 (D.D.C. 1975). Judge Gesell held that the statement was defective because it omitted consideration of other potential relocations by other agencies to the same general site. The court noted (*id.* at 1186):

> [W]hile neither of these projects has received final approval, they have advanced beyond the point of conjecture and speculation. * * * In such a situation, the National Environmental Policy Act requires the impact statement to consider the cumulative environmental effect that the relatively concurrent federal actions may have at the common site. One of the primary purposes of the Act was to prevent the very type of fragmented and compartmentalized analysis that occurred here. Instead, the statute directs that the agency employ a more integrated and comprehensive approach which takes account of the overall effect of the various projects.

These lower court decisions concerning the need for a comprehensive environmental statement when a number of federal actions are related is fully consistent with this Court's decision in SCRAP II. SCRAP II involved review of a determination of the Interstate Commerce Commission not to forbid a general rate increase proposed by the Nation's railroads, in response to a contention that inadequate consideration had been given to environmental factors. Individual rates may be challenged on the grounds that they are unjust and unreasonable. 49 U.S.C. 15. The ICC proceeding in SCRAP II, however, was a general revenue proceeding which is initiated when an across-the-board, flat percentage rate increase is proposed with the justification that the railroads' needs for immediate revenue require it. The issues before the ICC in such a proceeding are extremely narrow. 422 U.S. at 323-327.

In light of these circumstances, this Court stated as to the scope of the environmental statement (*id.* at 322):

> In order to decide what kind of an environmental impact statement need be prepared, it is necessary first to describe accurately the "federal action" being taken. The action taken here was a decision—entirely nonfinal with respect to particular rates—not to declare unlawful a *percentage increase* which on its face applied equally to virgin and some recyclable materials and which on its face limited the increase permitted on other recyclables. As in most general revenue proceedings, the "action" was taken in response to the railroads' claim of a financial crisis; and the inquiry * * * was primarily into the question whether such a crisis—usually thought to entitle the railroads to the general increase—existed, leaving *primarily* to more appropriate future proceedings the task of answering challenges to rates on individual commodities or categories thereof. The point is that it is the latter question—usually involved in a general revenue proceeding only to a limited extent—which may raise the most serious environmental issues. The former question—the entitlement of the railroads to some kind of a general rate increase—raises few environmental issues and none which are claimed in this case to have been inadequately addressed in the impact statement. (emphasis in original; footnotes omitted)

This Court then, in light of the "limited nature of the decision" in the general rate proceeding, approved the "apparently sensible decision by the ICC to take much more limited 'action' in that proceeding and to undertake the larger action in a *separate* proceeding better suited to the task" (emphasis in original). *Id.* at 327, 326.

All the factors considered by this Court in SCRAP II make clear that the full requirements of NEPA apply to the actions being taken by the federal petitioners. As we have seen above, the federal action in the instant case is not a solitary approval of a mine or the isolated grant of a right-of-way. Rather, here there have already been dozens of actions taken and hundreds more are likely in the near future. These actions are final determinations. They are not subject to review or reversal in subsequent proceedings.[80] Taken together, they constitute a commit-

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[80] For example, the decision of the Department of the Interior to issue a coal mining lease is final and virtually irrevocable. In *Union Oil* v. *Morton*, 512 F.2d 743 (1975), the Court of Appeals for the Ninth Circuit ruled in regard to a comparable lease for oil that the Secretary of the Interior could not terminate the lease without treating it as a taking of property for which due compensation would have to be paid. The Department takes the position that it therefore cannot prevent development of an existing lease, unless it is given authority by Congress, in effect, to condemn and pay compensation or to require substitution of lands in a lease. Answers of Secretary Kleppe to Questions Submitted by the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee, in connection with the hearing of February 16, 1976, #19 (hereafter Answers of Secretary Kleppe). Thus, whatever

ment to intensive energy development of the Northern Great Plains. We submit that the federal actions being taken, involving numerous related actions seriously affecting the environment of an entire region, require the preparation of a regional environmental impact statement.[81]

Petitioners rely on a group of decisions to argue that environmental statements may be restricted to a particular proposed action even though that action may be related to other Federal actions. Fed. Br. 36, note 28; AEP Br. 37-43. Respondents submit that scrutiny of these decisions merely reveals the extent to which they depend on their particular facts. As we have seen, the Court of Appeals for the Ninth Circuit clearly so found in rejecting the same proposition urged by petitioners. In so doing, it distinguished its own previous rulings and held instead that an environmental statement on a specific federal action—approval of a mining plan—was not sufficient since no broader environmental statement. *Cady* v. *Morton*, *supra*, 527 F.2d at 794-795.

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environmental assessment is to be done regarding coal leasing, it must precede the decision to issue the lease. A failure to conduct a proper analysis prior to that decision cannot later be rectified by reconsideration.

[81] This Court in SCRAP II carefully pointed out the distinction between the limited role of the ICC in a general revenue proceeding and the type of decision which another sort of agency can make "for example, that of an agency deciding whether and where to build a new prison." 422 U.S. at 322, note 21. The function of the Department of the Interior here is far more analogous to that of the Department of Justice in the case of *Hanly* v. *Mitchell*, 460 F.2d 640 (C.A. 2, 1972), cited by the Court. The Department of the Interior has the power to decide not to issue any lease (see, for example, the moratorium decided upon by Secretary Morton in 1973, described in the Affidavit of Secretary Kleppe (App. 189)), or to determine the system for leasing (see AEP Br. App. 1a-14a). There is no statutory requirement that the Department of the Interior must issue leases, only broad discretionary power to do so under regulations of its own adoption. 30 U.S.C. 201(a).

Thus, *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1285 (C.A. 9, 1974), and *Sierra Club* v. *Callaway*, 499 F.2d 982, 990 (C.A. 5, 1974), depend heavily on the fact that Congress had separately approved and authorized funding for each project at issue in those cases. Moreover, the court in *Sierra Club* v. *Callaway* stressed the extremely uncertain and long-range nature of the broader project of which the specific dam was claimed to be a part and emphasized that the dam was already 72 percent complete. *Id.* at 988. Similarly, in *Sierra Club* v. *Stamm*, 507 F.2d 788, 794 (C.A. 10, 1974), the court did not require a broader environmental statement because the overall project would not be completed until sometime in the next century. On the other hand, in *Indian Lookout Alliance* v. *Volpe*, 484 F.2d 11, 19-20 (C.A. 8, 1973), based on the particular facts of that case, the court of appeals required the preparation of an environmental statement broader in scope than that which the federal agency had prepared, even though narrower than the plaintiffs had sought.[82]

AEP petitioners cite (AEP Br. 37), as a common thread in many of the decisions on which they rely, the fact that individual projects have often been approved where the courts found "the proposed project had independent utility so that its approval did not commit the government to other aspects of the overall project, program or plan." The federal petitioners, on the other hand, agree (Fed. Br. 51, note 38) with the view of the respondents that instead of looking at some "independent utility" of the project, "it is more appropriate to look

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[82] In *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275 (C.A. 9, 1973), the question was not directly the scope of the environmental statements on the three electric power plants, but rather whether the Department of the Interior should have withheld approval until its Southwest Energy Study had been completed. The court there ruled that it was not necessary to wait until all possible facts were known. This question is not in issue in the instant case.

to the language of NEPA to determine when an impact statement is necessary and what the appropriate scope of that statement should be." Thus, the federal petitioners appear to agree, as SCRAP II strongly suggests, that, in determining whether a comprehensive environmental statement is required by NEPA, each situation must be evaluated in terms of its particular facts. This approach was expressly recognized by the Court of Appeals for the Fifth Circuit in *Ecology Center of Louisiana* v. *Coleman*, 515 F.2d 860 (1975). There, the district court had ruled that the highway project at issue was not "improperly segmented for the purpose of environmental analysis * * *." *Id.* at 870. The court of appeals determined that the district court "came to an improper conclusion" because there were genuine issues of material fact so that summary judgment for the defendants was erroneous. *Ibid.*

3. The Council on Environmental Quality, the Environmental Protection Agency, and Other Federal Agencies Have Interpreted NEPA to Require the Preparation of Comprehensive Environmental Impact Statements to Consider Related Federal Actions

We have shown above that the federal courts have often held that NEPA requires the preparation of comprehensive environmental statements to consider related federal actions affecting the environment. This has likewise been the administrative interpretation of NEPA by the Council on Environmental Quality, Environmental Protection Agency, the Department of the Interior, and numerous other federal agencies.

a. *The Council on Environmental Quality and Environmental Protection Agency.* CEQ and EPA have each construed the requirements of the National Environmental Policy Act with regard to comprehensive environmental statements. CEQ's interpretation of NEPA in

this regard, prior to its formalization in the CEQ Guidelines, was first stated in 1971. Its General Counsel explained that a comprehensive statement, rather than an individual statement, should be prepared in situations where it is important to "ensure consideration of cumulative effects and make possible a more exhaustive examination of effects and alternatives than would be possible in an environmental statement on each individual action." Quoted in *Natural Resources Defense Council* v. *TVA*, 367 F. Supp. 128 (E.D. Tenn. 1973).

The original CEQ Guidelines, issued in April 1971, similarly stated (36 Fed. Reg. 7724):

> The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action (and of further actions contemplated).

The present Guidelines contain almost the identical statement and then describe how federal actions can be "cumulatively considerable" (40 C.F.R. 1500.6(a); 38 Fed. Reg. 20551):

> This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action.

The present Guidelines then go on to state (40 C.F.R. 1500.6(d)(1); 38 Fed. Reg. 20552):

> Agencies should give careful attention to identifying and defining the purpose and scope of the action which would most appropriately serve as the subject of the statement. In many cases, broad program

> statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., coal leases), or environmental impacts that are generic or common to a series of agency actions (e.g., maintenance or waste handling practices), or the overall impact of a large-scale program or chain of contemplated projects (e.g., major lengths of highway as opposed to small segments).

The Environmental Protection Agency has likewise strongly supported comprehensive environmental impacts statements. In transmitting EPA's comments on the proposed guidelines to CEQ, the Administrator of EPA cited the particular importance of comprehensive statements on interrelated federal actions (Letter from William D. Ruckelshaus to Russell E. Train, in Hearings on the Administration of the National Environmental Policy Act—1972, Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, No. 92-94, 92d Cong., 2d Sess. 368-369 (1972)):

> Our second suggestion aims at resolving the difficulty of putting into perspective the environmental effects of closely inter-related activities. This frequently occurs in two types of situations. In the first situation, major components of a single large project are analyzed through separate impact statements, and often the most damaging components are analyzed only after substantial resources have been committed to other components of the project. In the second situation, a number of independently proposed projects having cumulative environmental effects on a small geographical area are analyzed without regard to each other. We therefore suggest that, to the greatest extent possible in these two types of situations, over-view statements be required. These over-view statements would be in addition to the impact statements on the specific project or component, and would provide the necessary perspective against which the needs, environmental effects, and alternatives for both the system of projects and the specific project could be assessed.

b. *The Department of the Interior.* Even prior to its recent decision to do regional environmental statements when taking a number of related actions in the same geographical area, the regulations of the Department of the Interior supported the practice of doing comprehensive environmental statements. In the instructions to carry out "the policy and directives of the National Environmental Policy Act" (Section 516.11), the Department elaborated on what should be considered a major federal action significantly affecting the quality of the human environment (Department of the Interior Manual, Section 516.2.5B):

> The statutory clause * * * is to be construed with a view to the overall, cumulative impact of the action proposed, and of further actions contemplated. * * *
>
> (1) In considering what constitutes a major Federal action, bureaus and offices should bear in mind that the effect of many decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when * * * one decision * * * is a precedent for action in much larger cases or presents a decision in principle about a future major course of action, or when several government entities individually make decisions about partial aspects of a major action.

The environmental statements under this section would of course have to deal with the cumulative effects of the actions involved.

CEQ, in carrying out its responsibility to monitor the effect and functioning of the NEPA process (see p. 98 below), sent to a number of government agencies a set of questions, including questions regarding the use of

policy and program impact statements. CEQ, Review of Implementation of the National Environmental Policy Act Questions and Outline for Response. In response, the Department of the Interior explained (Answer to Question 3.02):

> Strong emphasis and support has been given bureaus * * * to utilize various types of program statements to assist in reducing the scope and size of subsequent statements, particularly where a large number of smaller actions are contemplated or where cumulative impacts and program alternatives are inappropriately analyzed on a project-by-project basis.

The Department then listed some 18 "major program type statements" [83] which it had prepared or planned

[83] The Department listed the following environmental statements:

Bureau of Reclamation:

- Atmospheric Water Resources Program
- Colorado River Basin International Salinity Control Project
- Fryingpan-Arkansas Project
- Columbia Basin Project

Bureau of Land Management:

- Timber Management Program
- Federal Coal Leasing Program
- Livestock Grazing Management Program
- Upland Oil and Gas Leasing Program
- OCS Accelerated Oil and Gas Leasing Program

Fish and Wildlife Service:

- Sport Hunting of Migratory Birds
- Wildlife Refuge Management Program

Bureau of Mines:

- Mine Subsidence Control Program
- Mine Fire Control Program

Southwestern Power Administration:

- Operating and Maintenance Program

Bonneville Power Administration:

- Annual Construction Programs

[Footnote continued on page 67]

to prepare during fiscal years 1975 and 1976. The Department indicated that comprehensive statements were of two types, depending on the particular program involved: "(1) nationwide program statements at the highest order of scale, (2) area or regional statements with a specific geographic extent * * *" (Answer to Question 3.01). The Department responded as to the value of comprehensive statements (Answer to Question 3.03):

> [P]rogram environmental statements have served the decision process in Interior. The service may not always be dramatic, but it covers an important level in decisionmaking. They provide the only large-scale environmental analyses of program-wide regulations, long-term cumulative program effects, and program alternatives. Because of their scope, they tend to focus environmental analyses on broader issues or issues of a longer term nature. For example, the Eastern Powder River Coal Development statement produced greater awareness of water problems in Wyoming than individual statements on mining plans would have done.
>
> We believe also that we can see a definite improvement in the planning process itself as well as in plan implementation because of program environmental statements. This is because the program statement focuses planning attention much more forceably on repetitive, aggregative, and cumulative problems.

Particular agencies of the Department of the Interior expressed similar use of, and enthusiasm for, comprehensive environmental statements. The National Park Service stated (Answer to Question 3.03):

[83] [Continued]

Geological Survey:

- Santa Barbara Channel Oil and Gas Development
- Southeastern Idaho Phosphate Development

Bureau of Indian Affairs:

- Crow Reservation Coal Development

> Program EIS's have and will continue to examine a wide range of alternatives upon which a decision can be made. Further, the program statement is the appropriate level for examining interrelated actions as well as cumulative impact. Project level statements speak primarily to impacts on a specific site and therefore do not aid in decisions which must consider broad issues.

Question 3.05 asked: "Does the agency use the policy or program EIS (1) to help assess alternatives, (2) to help assess cumulative effects of similar or otherwise related projects involving one or more agencies, (3) to serve as guides to subsequent project-level EIS's, or (4) to serve several or all of such purposes?" The National Park Service replied that it used the "program environmental statement to serve all of the purposes outlined in the question."

The Bureau of Reclamation stated that it is "utilizing the overall project environmental statement to look at cumulative impacts of its larger projects" (Answer to Question 3.02). The Bureau of Outdoor Recreation said that it (Answer to Question 3.05):

> used the policy EIS to help assess cumulative effects of similar or otherwise related projects involving one or more agencies. In view of the interrelationships of outdoor recreation programs, facilities, and services of the major Federal land managing agencies, the cumulative effects of the combined efforts and actions of these agencies were given serious consideration and assessed in terms of their total effect, and through the EIS process, these issues were addressed and decisions made thereon.

In sum, not only has the Department of the Interior adopted the position of the respondents, that broad-scale analysis of cumulative effect must be prepared, but even has discovered that they have exactly that utility

which respondents have claimed (see pp. 89-95 below). The "greater awareness of water problems in Wyoming" produced by the Eastern Powder River Statement[84] is precisely the sort of understanding which respondents have argued could be produced only by comprehensive environmental statements rather than individual, site-specific analyses.

c. *Other Federal Agencies.* Many other departments and agencies have adopted a policy of employing broad, comprehensive environmental statements. The circumstances calling for such statements depend of course on the nature of the federal action being considered and thus on the function of the particular agency. For example, the Department of Housing and Urban Development has adopted the following regulation (38 Fed. Reg. 19185):

> (5) Evaluation of comprehensive activities.
>
> Individual actions that are related either geographically or as logical parts in a composite of contemplated actions may be more appropriately evaluated in a single environmental clearance. For example, several subdivisions may form a large new development. Likewise, a comprehensive project may be composed of, or include, several interrelated activities, e.g., development of a new community or redevelopment of a center city area. In these cases, and where feasible, HUD offices should aggregate individual activities into a larger package and environmental evaluation shall concentrate on the broad and cumulative impacts of the larger activity, as well as the project's specific im-

[84] We will discuss below (pp. 102-108) whether the scope of the Eastern Powder River Statement is in fact adequate for proper analysis of the vast environmental impacts of coal development in the Northern Great Plains. Nonetheless, whether or not the scope of the statement is sufficient, it is conceded by the Department to constitute a useful, regional analysis.

> pact of component activities to the extent known.

The Forest Service employs what it terms a "3-tier approach." See Statement of John R. McGuire, Chief, Forest Service, National Environmental Policy Act Oversight Hearings, *supra*, pp. 39-40. The broadest type of environmental statement is the program document. The second tier is the unit plan, based on the Forest Service's land use planning system under which "lands are divided into large planning areas which are specific geographic areas containing social and physical resources and land characterictics of a generally similar nature. • • • The unit plan becomes the basis for all action within the specific geographic area. It provides a guide as to what, where, and when various resource activities will be carried out." *Id.* at 40. The third tier is the site specific or project environmental statement. Mr. McGuire went on to distinguish between the uses of the broader statements and the project statement, noting that "a project statement can address site specific factors but not the cumulative effects of many different types of projects." *Id.* at 41. Forest Service regulations encourage use of broad environmental statements, noting that "program statements will be appropriate in order to assess the environmental effects of a number of individual actions in a given geographical area." Forest Service Manual, Section 8411.43. "A programmatic approach has the advantage of permitting the analysis of cumulative effects or possible synergistic effects of a series or group of actions." *Id.*, Section 8411.44.

The Army Corps of Engineers informed CEQ (Answer to Question 3.02):

> Corps regulations call for the preparation of composite environmental statements which group several similar projects which serve the same general purpose because of their relationship geographically

> or involve common or similar environmental impacts. • • • The purpose of these composite statements is to reduce the number of statements and address the cumulative impacts of the projects as a group rather than on an individual basis.

Asked how the Corps employs a policy or program environmental statement (Answer to Question 3.05), the Corps responded:

> For selected program EIS's, covering a variety of Corps activities, alternatives are discussed and evaluated to determine general trends and cumulative impacts induced by the project or on similar projects as a group rather than on an individual basis. The significance of the regional, national and international impacts produced by the project supported by information regarding the relative scarcity or abundance of the environmental resources in question is also discussed and evaluated.

The Army noted that it encourages preparation of "[p]rogram or generic EISs wherever possible" (Answer to Question 3.01) and said that, in contrast to project environmental statements, the "policy or program EISs serve to bring together the many facets of an action and enable the overall environmental impact to be assessed" (Answer to Question 3.03).

The Department of Transportation has taken the position that environmental statements (Department of Transportation, Procedures for Considering Environmental Impacts (Section 7.h, 39 Fed. Reg. 35238)):

> must be broad enough in scope to avoid segmentation of projects and to insure meaningful consideration of alternatives. In certain circumstances, statements will be required for broad programs in order to assess the environmental effects of a number of actions in a geographical area, the environmental impacts that are generic or common to a series of actions, or the overall impact of a chain of contemplated projects.

The Environmental Protection Agency urges preparation of environmental impact statements for total programs which include "component projects" and points out that even where there are "a number of minor, environmentally insignificant actions," the "cumulative environmental impact of all of these actions shall be evaluated" if the minor actions are "similar in execution and purpose, during a limited time span and in the same general geographic area." 40 Fed.Reg. 16817. The National Aeronautics and Space Administration has carried out its responsibilities under NEPA through "institutional" and "program" statements, both of which "tend to be 'broad program statements' by the CEQ definition * * *." 39 Fed. Reg. 13001. The Department of Commerce, which has established guidelines for preparing policy and program as well as project environmental statements, described the utility of *comprehensive* statements (Answer to Question 3.03): "A policy or program EIS in the development and enforcement of administrative or regulatory controls could be of major assistance in projecting the social and economic costs along with the purported environmental benefits of the proposed action."

In short, virtually all of the agencies of the federal government whose actions frequently affect the environment have perceived the need, in order to carry out the requirements of NEPA, of preparing comprehensive environmental impact statements to enable them to evaluate the broad implications of cumulative actions, whether they are related geographically or in other ways. Thus, the present policy of the Department of the Interior simply brings it into conformity with the general practice of the federal government.

C. THE NATIONAL ENVIRONMENTAL POLICY ACT REQUIRES THE PREPARATION OF A REGIONAL ENVIRONMENTAL STATEMENT CONCERNING COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS BECAUSE OF THE NUMBER AND CLOSE RELATIONSHIP OF THE FEDERAL ACTIONS BEING TAKEN

We have seen above that the language, history, and judicial and administrative interpretation of NEPA is that comprehensive statements are required concerning related federal actions. We will now show that the numerous federal actions concerning coal development in the Northern Great Plains constitute such a situation requiring preparation of a comprehensive environmental impact statement.

1. The Federal Actions Involved in Coal Development of the Northern Great Plains Are Related in a Manner Requiring Preparation of a Comprehensive Environmental Impact Statement

The Guidelines of the Council on Environmental Quality state that "broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area * * *, or environmental impacts that are generic or common to a series of agency actions * * *, or the overall impact of a large-scale program or chain of contemplated projects * * *." 40 C.F.R. 1500.6(d)(1); 38 Fed. Reg. 20552. Thus, the Guidelines state that a comprehensive environmental statement is required when federal actions are geographically, environmentally, or programmatically related. Respondents submit that the numerous federal coal and coal-dependent actions in the Northern Great Plains region are related under each of these criteria.

The geographic relationship is clear. All the federal actions involve coal development in a particular geo-

graphic area. As we will see below (pp. 102-108), the appropriate region is the area of the Fort Union and Powder River coal formation.

The second type of relationship, the environmental relationship, is probably the most crucial in the context of this case. The numerous projects resulting from the past and proposed federal action in the Northern Great Plains will produce a wide variety of cumulative environmental impacts.

For example, the court of appeals properly referred to the cumulative effect of coal-related projects on the availability of water. Fed. Reg. App. A, p. 38A, note 28. The climatological characterization of most of the Northern Great Plains is semi-arid to arid. NGPR Program Report, p. 45. Much of the present water supply depends on subsurface sources, whether carried in shallow aquifers which often rest on the impermeable beds of coal, or contained in deep rock formations such as the Madison Limestone formation underlying the Powder River area of Wyoming. Eastern Powder River Statement, pp. I-195 to I-217. Recharge of these waters depends on infiltration of precipitation and movement of waters between aquifers. *Id.* at I-217 to I-229. Removal of the coal aquifers through mining destroys that shallow resource. In areas where grasses and hay meadows rely on subsurface irrigation provided by the coal aquifers, there will be an adverse, probably destructive, impact on the vegetation.

Coal-related development requires huge amounts of water. Electric power plants consume for cooling purposes approximately 10,000 to 12,000 acre feet of water per year, for every 1000 megawatts. NGPR Program Report, p. 7). Since these waters are evaporated, they are lost for other use. Coal gasification plants depend on vast quantities of water, approximately 10,000 acre feet per year, for the gasification process. NGPR Program Report, p. 72. It also is lost through evaporation. Slurry

pipelines for the transportation of coal use water to carry finely ground coal particles from point of origin to the destination, where the coal is dried by evaporating the water and is then burned. The proposed coal slurry pipeline from the Powder River Basin in Wyoming to a power facility in Arkansas is estimated to require 6.5 billion gallons of water per year which, it is proposed, will be obtained from the Madison Formation. Washington Post, December 1, 1975, p. A-1. This water will not return. Increases in population will mean additional water consumption for various domestic and commercial uses.

Water is a regional resource. For example, the Madison Formation "extends from Wyoming into Montana, North and South Dakota, portions of Nebraska, north to Canada and south to Colorado and Utah." Underground Water in the Madison Limestone, reprinted in Greater Coal Utilization, Joint Hearings of the Senate Committees on Interior and Insular Affairs and Public Works, S. No. 94-18, 94th Cong., 1st Sess. 447 (1975). Similarly, the Yellowstone River and its tributaries drain the coal areas of northeastern Wyoming and southeastern Montana. The Upper Missouri River drains the entire Northern Great Plains region. Water is obviously a finite resource within any given area and particularly in a semi-arid region like the Northern Great Plains. Each commitment of water resources affects future possible commitments. Each project which consumes large quantities of water has an effect far beyond its own scope, both physically, in terms of water circulation and recharge, and temporally, since it may preclude some other form of development in the future. The consumption of water by one project will mean that less water is available for agriculture, wildlife, human consumption, and other industrial projects.

If all related federal actions are not considered together, the analysis of the impact of a particular project

and the alternative uses of water will be impossible. One project all by itself may cause little harm. On the other hand, numerous projects may mean that agricultural and wildlife uses downstream will be severely interfered with. The combination of projects may require a rational system of water allocation which will maximize use of the water to protect the competing uses to the maximum extent possible. A comprehensive analysis is essential if this alternative, of allocating water to priority use, is to be fairly considered. Similarly, only a comprehensive analysis is likely to lead to requirements that projects use the best technology available to reduce consumption of water.

For these reasons, the scope of analysis must extend beyond the particular project to others using substantial amounts of water from the same sources. Not only NEPA but common sense requires such analysis.[85]

Strip mines, power plants, and coal gasification plants all cause water pollution if the water used by them is discharged so that it may enter ground water or streams. NGPR Program Report, pp. 91-95. This pollution is obviously cumulative if several projects discharge into the same body of water. Again, if a single project is analyzed it may well be found to cause little damage. Taken together, the opposite may be true. The result of a comprehensive analysis may well be to determine what level of pollution will be allowed and, in effect, to allocate it so that only the highest priority projects are permitted. Alternatively, such cumulative analysis might lead to approving only projects which eliminate or at least minimize pollution discharges.

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[85] The need for regional consideration of water resources has been expressly recognized by the Department of the Interior. As we quoted above, the Department told CEQ that "the Eastern Powder River Coal Development Statement produced greater awareness of water problems in Wyoming than individual statements on mining plans would have done." Answer of the Department of the Interior to CEQ Question 3.03.

Air of course moves regardless of political boundaries or artificial lines. Air pollution therefore results not only from the power plant in the immediate vicinity, but from others upwind, and increases with each additional facility. The extent of pollution cannot be determined by looking at only one project, or even at only one area bounded by maps rather than meterology. Again, a comprehensive analysis might lead to establishing a level of pollution which would be permitted and allocating it rationally or requiring especially strict pollution controls to prevent pollution from occurring.

The various projects are also interrelated environmentally because they increase population in the region. This results not merely from the employees themselves but their families, the numerous people who are needed to provide commercial and governmental services for them, and their families. Again, the cumulative effect of the projects is likely to be far different than for any individual project alone. Similarly, comprehensive analysis is likely to lead to consideration of far different alternatives such as tax and grant programs to provide the greatly increased need for education, law enforcement, and social services, the adoption of land use planning, and the creation of new towns.

These so-called secondary impacts are of great importance. EPA has pointed out (Hearings on the Administration of the National Environmental Policy Act —1972, *supra*, p. 372):

> In setting forth the range of environmental considerations appropriate for a particular type of project, the conceptual framework must go beyond obvious questions such as air and water pollution. * * * Impacts on population patterns or community behavioral patterns may affect the quality of the human environment much more than impacts on air and solid waste.

The CEQ Guidelines specifically require consideration of such secondary impacts in environmental statements. 40 C.F.R. 1500.6(b); 38 Fed. Reg. 20551.

The Eastern Powder River Statement admits that the secondary effects of coal development will be irrevocable (p. I-859):

> Development of coal resources in the Eastern Powder River Coal Basin of Wyoming will produce a region completely different from that existing at present. Industrial history suggests that changes will develop over time and will be of very long term —for practical purposes, permanent.
>
> • • • •
>
> Both short-term and long-term development and use of regional resources will change long-term productivity of the basin. From a typical western ranching area, it will be transformed into an industrialized region with mining of coal and its utilization becoming the dominant industry and financial foundation.

The cumulative impact of the various projects may even drastically affect the very climate of the region. According to BLM's recent Draft Environmental Impact Statement for the Proposed Reservoir on the Middle Fork of Powder River (p. 8-33):

> The coal liquefaction plants would likely result in some minor changes in the micro-climate of the immediate plant areas, such as slight increases in air temperature and humidity.
>
> In conjunction with other proposed and projected development in the Eastern Powder River Basin, climate could be affected to a significant degree.
>
> • • • •
>
> Some evidence indicates that changes of atmospheric particulate loading and alteration of the earth-atmospheric energy balance may contribute to creation of drought conditions in semiarid climates.

This disastrous effect on an area with already insufficient rainfall would not be the result of a single industrial plant. However, the cumulative effect of a group of energy facilities may be a vast desert.

We have noted that comprehensive analysis of environmental impact is necessary to consider various alternatives to mitigate the environmental effects of numerous coal-related projects. This kind of analysis of the cumulative effect could also lead to a determination that coal should be exported from the region rather than converted to electricity or gas within it. Such an export policy would avoid most of the consumption of water, air and water pollution, increased population, and changes in climate. However, it is unlikely even to be considered unless the totality of coal development is analyzed altogether.

The Department of the Interior has itself recognized the inadequacy of project-by-project analysis. Of course, its determination to prepare regional statements reflects such a determination. Moreover, an earlier report of the Northern Great Plains Resources Program asked the question: "Is the impact of two mines or powerplants in the same areas twice as great as the impact of one, or is it larger?" NGPR Program Draft Interim Report, p. V-2. Similarly, as we quoted earlier, Robert Jones of the Bureau of Land Management recently told the House Merchant Marine and Fisheries Committee that "[o]ne project in the area might have acceptable environmental consequences, but, if you have border-to-border projects all the way across you have a substantially different environmental situation." National Environmental Policy Oversight Hearing, *supra*, p. 31.

Third, the federal actions involving coal development in the Northern Great Plains are programmatically related. Secretary of the Interior Kleppe has recently admitted this relationship. As he explained to the Senate

Interior Committee, "mining coal from one or more leases might have substantially broader significance than the direct impact of the particular lease operations and may set the course of development for geographic areas encompassing both Federal and non-Federal lands" (see App. A below, p. 3a).[86]

There is a very close inter-relationship between all the various proposals for exploiting the area's coal. All the proposals are based on strip mining large quantities of coal and then either (1) having mine-mouth plants convert the coal into electricity, gas, liquid fuels or petrochemicals and using electric transmission lines, pipelines or other methods to transport these products to distant markets or (2) transporting the coal by railroad or slurry pipeline to power plants and other facilities in other areas of the country. As we have seen, tremendous quantities of water will be required to carry out any of these proposals, thus necessitating the construction of dams and reservoirs. The network of railroads, transmission lines, aqueducts and pipelines which is being built will of course serve numerous mines and facilities.[87]

The argument of the federal petitioners that the only common thread between the federal activities in the Northern Great Plains is that "they all have to do with coal mining" (Fed. Br. 31, note 24) simplistically ig-

[86] Judge McKinnon, dissenting below, noted the situation where "a federal action at one point in the 'region' would cause a ripple effect which would eventually have an impact on future federal actions elsewhere in the 'region.'" Fed. Pet. App. A, p. 61A. In such a case, Judge McKinnon conceded, "this court and the Second Circuit quite properly found that an EIS for the entire project was necessary before the initial step could be taken." *Id.* at 62A. Subsequent to the court of appeals' decision and Judge McKinnon's dissent, Secretary Kleppe has admitted such a ripple effect as to coal mines in the Northern Great Plains in the statement quoted in the text.

[87] Aqueduct Report, pp. 3-12; Powder River Basin Report, p. 9.

nores the obvious fact that coal has value only as an energy source. While the key initial decision is to approve coal mining, from this all else follows. Once the coal is mined, it will be used.

The Department of the Interior certainly recognizes this fact. The NGPR Program Report, as we have seen (pp. 13-14 above), looked at the various possible uses for coal within the study region, concluding that coal development would be likely to result in as many as 25 electric power plants and 41 coal conversion plants. The transportation of coal outside of the region would of course require the installation and use of railroads or pipelines. The transmission of coal converted to energy would require erection of transmission lines or the laying of pipelines. NGPR Program Report, pp. 2, 33-38. The Eastern Powder River Statement notes that by 1990 that coal basin will probably contain 14 mines, 6 power plants, 2 coal gasification plants, 225 miles of new powerline, 150 miles of new railroad, and will be the starting point for 1040 miles of slurry pipeline. Eastern Powder River Statement, *supra*, p. I-56. This development will require at least 90,000 acre feet of water per year. *Id.* at I-58. The argument of the federal petitioners flies in the face of not only reality but also of the Department of the Interior's own analyses.[88]

[88] The regulations of the Bureau of Land Management expressly direct that environmental statements must look beyond the individual project to "[d]etermine the need for the action. For example, a road is not an end in itself, but is constructed for some major purpose—perhaps to remove timber. The reason for doing this is to establish the proper scope for the environmental analysis. It may be, for example, that the analysis should be done on a timber sale, or a grouping of sales in one drainage rather than on a road." Bureau of Land Management, "Environmental Analysis," Section 2.21.B. Likewise, coal mining is not an end in itself. The proper scope of the environmental analysis depends on the "need for the action," here intensive energy development throughout the Northern Great Plains region.

The federal petitioners have treated the various activities being taken and considered concerning coal development in the Northern Great Plains region as closely related. The North Central Power Study, the Appraisal Report on Montana-Wyoming Aqueducts, and the Northern Great Plains Resource Program all focus on regional coal development. The North Central Power Study, which was initiated by the Department of the Interior and carried out by the Bureau of Reclamation and various utilities, studied possible mine-mouth electric power plants and long-distance electrical transmission lines throughout the region. Soon thereafter, the Bureau of Reclamation completed its Appraisal Report on Montana-Wyoming Aqueducts which investigated water resources for coal development in northeastern Wyoming and southeastern Montana and described a potential system of dams, reservoirs, and aqueducts throughout this large area. The Aqueduct Appraisal Report (p. 31) stated that: "The apparent impact of the development will require that full-scale comprehensive studies be initiated in the near future, in cooperation with the states and others, to assure an orderly and manageable growth pattern to minimize adverse environmental effects and impacts." [89]

The Department of the Interior's Press Release announcing the NGPR Program stated that it "would be an effort to coordinate ongoing activities and would replace "partial attempts to deal with this region" (App. 133-134). This belated federal attempt to coordinate development was instituted because activities in the region "often are not well coordinated and decisions often are made on an ad hoc basis" (App. 135). Thus, the Program was designed to "foster integrated consideration of basic natural resource use and protection [and] * * *

[89] Neither the North Central Power Study nor the Aqueduct Appraisal Report contains any substantive analysis of environmental considerations.

consider the full range of economic, social, and environmental consequences of alternative plans of land and resource management in the region" (App. 137).

The Secretary of the Interior specifically described the NGPR Program as "aimed at providing this control over development of * * * Northern Great Plains resources * * *." Memorandum of Secretary Morton (App. 144). More recently, the Secretary described that Program and the other earlier studies as "attempts to control development of coal * * * in the Northern Great Plains. * * * These actions * * * are attempts to control development by individual companies." [90] Affidavit of Secretary Morton (App. 119).[91]

[90] The federal petitioners state (Fed. Br. 32) that "it is not entirely clear to us what the court of appeals means by its conclusion that the government's 'role is one of controlling development of the region'" and argue (Fed. Br. 32-34) that the government is not doing so. The petitioners appear to have forgotten that the term "control development" originated with Secretary Morton, not the court of appeals.

[91] The federal petitioners (Fed. Br. 34, note 25) claim that the effect of the decision of the court of appeals will be to discourage "sophisticated studies like the Northern Great Plains Resources Program" because it may lead to a judicial conclusion that the federal government is engaging in action in the area under study. One must hope that the federal government engages in such studies only when there is good reason to do so, and there clearly was here. It could hardly be termed a frivolous undertaking, unrelated to present or future federal actions. Secretary Morton, in launching the study, stated that (App. 133):

> These major coal resources will be developed, that is inevitable, but how they are developed is of national interest. As a Nation we must learn to develop our resources without the traditional environmental losses. In charging this task force with the responsibility of detailing and publicly reviewing all aspects of the proposed development with a critical view toward the strict controls which will be mandated as this program goes forward.

In any event, it is the federal petitioners' contentions which will lead federal agencies to avoid environmental studies and planning

Various federal officials have repeatedly stated that the activities involved in the coal development of the Northern Great Plains were related and required comprehensive environmental study and planning. In 1972, the Assistant Secretary for Public Land Management of the Department of the Interior, Harrison Loesch, told Congress that "it seems clear to us also that for proper development of the resources, for meeting energy needs, we have to consider coal development on at least basin-wide basis, along with all the other factors which are going to affect the environment in that area." He then stated that "[we] are presently investigating the necessity, and we think it is a necessity, of rather comprehensive study and planning effort in the large coal basin areas of Montana and Wyoming." Federal Leasing and Disposal Policies, Hearings before the Senate Interior Committee, 92d Cong., 2d Sess. 84, 85 (1972). The Department of the Interior answered questions propounded by the Committee by stating (*id.* at 189):

> An assurance of orderly and timely development would require an analysis and assessment of such items as regional coal demand and the relationship to existing leases. The Department is initiating a State, local and Federal program to develop a regional development plan or framework for the Montana, Wyoming, North Dakota and South Dakota area associated with the Powder River and Fort Union coal formations. The objective is the wise development of the region accomplished in full realization of social, economic and ecological consequences of alternative possibilities.[92]

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because only if they do so will the requirements of NEPA concerning comprehensive environmental statements apply. We, on the other-hand, contend that, regardless of any federal program or plan, a comprehensive environmental statement is required when federal agencies take a number of related actions.

[92] The Department of the Interior was apparently referring to the Northern Great Plains Resource Program even though the Department has subsequently claimed that the program was not designed to develop a plan for the region.

Secretary of the Interior Morton wrote Senator Mansfield on July 18, 1972, that "[w]hat is needed, I believe is a major comprehensive study to evaluate alternatives regarding development concepts and their impacts, and to arrive at a sound plan for regional development * * *" (Ct. of Appeals App. 72). The Secretary had just previously announced the proposal for the NGPR Program in a memorandum to his Assistant Secretaries (Memorandum of the Secretary (App. 130)):

> The vast reserves of coal in the Fort Union Region of Montana, North Dakota, South Dakota and Wyoming provide an excellent opportunity for this Department to demonstrate how a responsible Federal agency can manage resources development with proper regard for environmental protection. It is important that we not lose this opportunity by engaging in single-purpose studies which are incapable of developing comprehensive information or by taking piecemeal actions which restrict our future options.

Secretary of Agriculture Butz wrote to Senator Mansfield, concerning the Northern Great Plains, that "there is considerable urgency and need for a coordinated mineral development strategy" (Ct. of Appeals App. 76) and to the Administrator of the Environmental Protection Agency on May 2, 1973, that "we agree that a comprehensive, systematic, and interdisciplinary study of all aspects of the development and use of coal resource is needed" (Ct. of Appeals App. 75). The Administrator of the Environmental Protection Agency stated (Ct. of Appeals App. 81):

> I am deeply concerned that the increasing pressure on State and Federal agencies to permit development of these coal fields will result in a series of unilateral, uncoordinated decisions with a deleterious cumulative impact on the environmental, social and ultimately economic values of this region.

The district court found, and petitioners contend, that a regional environmental statement is not required because the federal government has not adopted a plan or program for the region. Fed. Pet. App. D, p. 99A; Fed. Br. 43-48; AEP Br. 26-28. We note that the federal petitioners did establish the Northern Great Plains Resource Program, which was clearly involved in planning analysis for the region. While no actual plan has been produced, this can clearly not be determinative.

We submit that the labels used by the federal agency are irrelevant. The federal action being taken here, no matter how labelled by the petitioners, amounts to full-scale, intensive development of the coal of the Northern Great Plains. The federal cases, CEQ Guidelines, and agency regulations which we have discussed above do not rely upon the terminology employed. Instead, they consider the relationship of the federal actions involved. Since, as we have shown above, the federal actions concerning coal development in the Northern Great Plains are closely related, they must be considered together in a regional environmental statement even though no regional plan was developed.

It would be logically absurd, and clearly inconsistent with NEPA, to determine that a federal agency has less obligation under NEPA the less planning it does. The statute repeatedly emphasizes the need for environmental planning.[93] NEPA requires the federal agencies "to use all practicable means * * * to improve and coordinate *Federal plans*, functions, programs and resources" to protect the environment (emphasis added). Section 101 (a), 42 U.S.C. 4321(a). In order to carry out these

[93] We believe that the language of NEPA does compel environmental planning. However, for purposes of this case, we need only show that NEPA requires a regional environmental statement whether or not regional planning has been done.

purposes, the very next section of NEPA requires federal agencies to "utilize a *systematic* interdisciplinary approach * * * in *planning* and in *decisionmaking* which may have an impact on man's environment"; to prepare a detailed environmental-impact statement on "major Federal actions significantly affecting the quality of the human environment" including the various alternatives presented; to "study, develop, and describe appropriate alternatives to recommended courses of action"; and to "utilize ecological information in the *planning* * * * *of resource-oriented projects*" (emphasis added). Section 102(2)(A)(B), (C), (G); 42 U.S.C. 4332(2)(A), (B), (C), (G). Thus, NEPA specifically requires planning and coordination relating to exploitation of federal resources.

The many cases decided under NEPA repeatedly emphasize that it places heavy responsibilities on federal agencies to consider all relevant environmental factors before making important decisions. As the court of appeal stated in *Natural Resources Defense Council* v. *Morton*, *supra*, 458 F.2d at 836, the Act requires "a comprehensive approach to environmental management wherein 'policy is established by default and inaction' and environmental decisions 'continue to be made in small but steady increments' that perpetuate the mistakes of the past without being dealt with until 'they reach crisis proportions.'"

The Department of the Interior has, in other fora, stated its belief in planning for the Northern Great Plains. Four years ago, the Assistant Secretary of the Interior for Public Land Management told Congress that planning for coal development of the region "is a necessity" and that the Department of the Interior was doing "overall land use planning." Federal Leasing and Disposal Policies. Hearing before the Senate Interior Committee, 92d Cong., 2d Sess. 85, 94 (1972). The Depart-

ment of the Interior, in answers to questions propounded by the Committee, stated that the Department was "initiating * * * a regional development plan or framework for the Montana, Wyoming, North Dakota and South Dakota area associated with the Powder River and Fort Union coal formations." *Id.* at 189. Secretary Morton has stated that "[w]hat is needed I believe * * * is a sound plan for regional development (Ct. of Appeals App. 72), "single-purpose studies" and "piecemeal actions" must be avoided (App. 130). The Chief of the Forest Service has said that "a prerequisite to further leasing should be a plan for coordinated development" (Ct. of Appeals App. 78). As recently as February 16, 1976, the Secretary of the Interior told a Congressional committee that "we think there ought to be regional planning concerning the Northern Great Plains." Transcript, Oversight Hearings on Federal Coal Leases, *supra*, Senate Interior Committee, p. 66.

Respondents do not seek a determination by this Court that regional planning is required. While we believe that NEPA does require environmental planning, that issue is not directly involved in this case. As the complaint clearly stated (App. 23), and as we continue to maintain, respondents seek merely a regional analysis of environmental impacts and alternatives in an environmental impact statement.[94] We simply maintain that

[94] The federal petitioners (Pet. Br. 43) claim that the court of appeals required the Department of the Interior to engage in comprehensive planning not mandated by NEPA or any other statute. The court of appeals, on the contrary, expressly refused to make such a ruling. Fed. Pet. App. A, pp. 31A-32A. Rather, the court found that the many ongoing and pending actions of the federal government in the Northern Great Plains, combined with the manner in which the government had treated the region, "comprised[d], cumulatively, a major federal action." *Id.* at 34A. Respondents' argument, accepted by the court of appeals, was that it would be absurd to have the government undertake these many actions, which were admittedly environmentally significant, and

the lack of a regional plan cannot change the federal petitioners' responsibilities under NEPA.

2. A Regional Environmental Impact Statement Is Necessary to Carry Out the Specific Requirements of Section 102(2) of the National Environmental Policy Act

Respondents have shown (pp. 11-16 above) that federal agencies have already taken and will be considering in the near future numerous significant actions relating to coal development in the Northern Great Plains region which will have a substantial effect on the environment. It is impossible, except cumulatively, to analyze "the environmental impact of the proposed action[s]" (Section 102(2)(C)(i)), the "adverse environmental effects which cannot be avoided" (Section 102(2)(C)(ii)), "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity" (Section 102(2)(C)(iv)), or the "irreversible and irretrievable commitments of resources" (Section 102(2)(C)(v)).

There will be substantial degradation of air quality from the numerous power plants proposed and of water quality from the many strip mines. It is obvious that these effects cannot be analyzed by considering only a single power plant or mine. The numerous power plants, coal gasification plants, slurry pipelines and other facilities will require huge amounts of water. The effect of these industrial uses in comparison to the available water supply and other uses plainly cannot be ascertained by examining only a single proposal. The effect on long-term productivity and irreversible commitments of resources due to the strip mining of farming and grazing land cannot be ascertained by examining only a

treat the region as such, and yet avoid the requirements of NEPA to prepare a regional environmental statement by simply withholding from its actions the label of "plan" or "program." *Id.* at 32A.

single mine. The effect of industrialization and urbanization on this largely uninhabited rural area cannot be determined by considering a single facility and the employees who will be attracted to it.

There will be drastic impacts outside of the Northern Great Plains as well. Hitherto, more than two-thirds of the coal produced in the United States has come from the Appalachian States. Coal Programmatic EIS, p. 8-30. Within the next decade alone, the present production of coal from the Northern Great Plains is expected to more than triple. Affidavit of Frank Zarb (App. 208). Utilities in the middle-west and south have already contracted for Northern Plains coal and it has even been shipped to West Virginia, the heart of Appalachian coal production. The impact on the already depressed economy of Appalachia of this tremendous increase in western coal production will not derive from any single mine or even from a small group of mines. This issue can only be analyzed by considering the total impacts on the east from coal production in the Northern Great Plains.[95]

It is equally impossible to analyze the "alternatives to the proposed action" (Section 102(2)(C)((iii)) without considering together the numerous federal actions in the same region. The CEQ Guidelines provide as to the content of environmental impact statements (40 C.F.R. 1500.8(a)(4)), 38 Fed. Reg. 20554):

> A rigorous exploration and objective evaluation of the environmental impacts of all reasonable alterna-

[95] The need for broad regional analysis of this question is demonstrated by the cursory discussion given to it in the Eastern Powder River Statement. In a brief comparison with mining in Appalachia, the Statement notes that "[a]ll producing mines and mines now being developed both in Appalachia and in the Eastern Powder River Basin have a ready market for low-sulfur coal * * *" (p. I-805). Whether or not this is true, the same could not be said if the analysis were directed to the coal production of the entire Northern Great Plains region.

> tive actions, particularly those that might enhance environmental quality or avoid some or all of the adverse environmental effects, is essential. Sufficient analysis of such alternatives and their environmental benefits, costs and risks shall accompany the proposed action through the agency review process in order not to foreclose prematurely options which might enhance environmental quality or have less detrimental effects. Examples of such alternatives include the alternative of taking no action or of postponing action pending further study; alternatives requiring actions of a significantly different nature which would provide similar benefits with different environmental impacts * * *; alternatives related to different designs or details of the proposed action which would present different environmental impacts (e.g., cooling ponds vs. cooling towers for a power plant or alternatives that will significantly conserve energy) * * *.

The Court of Appeals in the District of Columbia Circuit has similarly stated that "it is the essence and thrust of NEPA that the pertinent Statement serves to gather in one place a discussion of the relevant environmental impact of alternatives." *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 834 (1972).

The importance of considering alternatives was made especially clear by Congress by adopting Section 102(2)(D) in addition to Section 102(2)(C)(iii). Section 102(2)(D) requires "all agencies of the Federal Government * * * [t]o study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." This provision applies, as its language makes clear, independently of Section 102(2)(C)(iii). 40 C.F.R. 1500.6(c), 38 Fed. Reg. 20551; *Hanly* v. *Kleindienst*, 471 F.2d 823, 835 (C.A. 2, 1972), certiorari denied, 412 U.S. 908 (1973).

The Court of Appeals for the Second Circuit has held in *Monroe County Conservation Council, Inc.* v. *Volpe*, 472 F.2d 692, 697-698 (1972), that:

> The requirements of a thorough study and a detailed description of alternatives, which was given further Congressional emphasis in § 4332(2)(D) is the linch-pin of the entire impact statement.

Similarly, in *Environmental Defense Fund* v. *Corps of Engineers*, 470 F.2d 289, 296 (C.A. 8, 1972), the court of appeals held that a "more extensive treatment of alternatives [i]s required by § 102(2)(D)" than by Section 102(2)(C) for environmental statements.

The adverse environmental impacts in this case are not inevitable since alternatives do exist. First, a study of the total effect of development, rather than just an analysis of individual pieces, could lead to the conclusion that no development should be permitted or that it should be limited to a specified number of acres to be strip mined or to a limited number of power or coal gasification plants to be built. It is significant that federal government figures show that there is approximately three times as much low-sulfur coal in the East as there is strippable low-sulfur coal in the entire West. Facts about Coal in the United States pp. 4-7, reprinted in Greater Coal Utilization, Joint Hearings of the Senate Interior and Public Works Committees, 94th Cong., 1st Sess. 233-236 (1975). It is further significant that eastern and midwestern coal is cheaper to deliver by train to eastern, midwestern and southern markets than coal from the Northern Great Plains. NGPR Program Report, p. 32. Thus, a regional analysis would compare the availability, cost, environmental harm, and other factors of western and eastern coal.

Second, an analysis of soil conditions, rainfall, climate and other factors throughout the whole region could lead to the conclusion that strip-mining should be continued only in portions of the region where reclamation was

most likely to be successful and should cease in other areas. This analysis is of great importance in a region where the possibilities of reclamation are extremely doubtful in some areas but significantly better in others where rainfall and other factors are more favorable. NGPR Program Report, pp. 52-55. The NGPR Program Report consequently states that "the potential for rehabilitating surface-mined land in the NGP is extremely site specific." *Id.* at 53. A decision to concentrating strip mining in a particular part of the region would mean that these areas would be industrialized but others would not be harmed. On the other hand, if present federal decision-making continues, mines and other facilities will be scattered and will cause harm to air and water quality, to wildlife, and to other elements of the environment throughout a vast region.

Third, the coal could be transported out of the region by railroad instead of locating power plants and coal gasification plants in the region which in turn will cause air and water pollution, use huge amounts of water, and produce a large increase in population. Alternatively, if industrialization is appropriate in the region, it could be decided, instead of having mine-mouth coal-burning power plants, that the coal should be converted into synthetic gas which can produce electricity in the region with far less air pollution or which can be transported by pipeline for use elsewhere.

Fourth, if it was determined that the coal was to be transported from the region, it could be decided that this should be done by railroad or slurry pipeline. A major national controversy exists concerning the cost of these competing modes of transportation. Cf. Department of the Interior, Bureau of Mines Information Circular 8690, Long-Distance Coal Transport: Unit Trains or Slurry Pipelines (1975), with Rieber, *et al.*, The Coal Future: Economic and Technological Analysis of Initiatives and Innovations to Secure Fuel Supply Independence, pre-

pared for the National Science Foundation (1975). In addition, a proper environmental analysis would compare air pollution, noise, the harm to wildlife and esthetic values, and increases in population from railroads with the substantial consumption of water in a semi-arid region by slurry pipelines.

Fifth, an analysis of the total environmental impact could result in considering alternative technological methods for developing the coal resources. As to each element of the planned development, several possible alternatives exist. It is possible to mine coal underground, thus avoiding the disruption of the land surface which strip mining produces.[96] Requirements could be imposed on power and coal gasification and liquefaction plants to use the best modern technology in order to reduce air and water pollution and minimize the use of scarce water. For example, if federal coal is to be used in mine-mouth power plants, the federal petitioners could require that these plants be air- rather than water-cooled in order to save water. Similarly, more advanced methods for controlling air pollution from electric power plants are available but are not generally used in the United States. The Environmental Protection Agency has concluded that emissions of sulfur oxides from electric power plants can be reduced 85 to 90 percent by stack gas cleaning systems. National Public Hearings on Power Plant Compliance with Sulfur Oxide Air Pollution Regulations, pp. 3, 27, 31 (1974). Urban planning and zoning laws could be required before major industrialization began.

Respondents of course do not ask the Court to decide between mining in the Northern Great Plains or in the east, between the use of low sulfur coal or sulfur-dioxide-

[96] There are fifteen times more coal reserves in the Northern Great Plains that can be extracted by deep mining than by strip mining. Environmental Policy Center, Tabulation of Coal Reserves (1973), Figures 1 and 2.

removal technology, or between deep or surface mining. Rather, NEPA requires that the federal agencies make such choices and decisions based on environmental studies and an environmental statement. Our point is that no way exists even to consider the basic alternatives without examining the coal development in the region as a whole.

Even if it is decided that development should proceed, a comprehensive environmental statement would consider what kind of development would make the maximum economic contribution to the region and the country and, at the same time, would best protect the environment. It would consider how the maximum coal could be mined with the minimum land destroyed, how the most energy could be produced with the least amount of water consumed, and how the most electricity could be generated in return for whatever level of additional air pollution is deemed acceptable, as well as legal, under the Clean Air Act. This cannot possibly be accomplished on the basis of environmental statements relating to isolated decisions but demands overall consideration of the principal alternatives which exist.

3. The Council on Environmental Quality and Environmental Protection Agency Have Concluded that the Preparation of a Regional Environmental Impact Statement Concerning the Northern Great Plains Is Required by the National Environmental Policy Act

The Council on Environmental Quality and Environmental Protection Agency have analyzed the coal developments in the Northern Great Plains and come to specific conclusions concerning the requirements of NEPA concerning this development. As we have quoted above, the CEQ Guidelines state that "[i]n many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., coal leases) * * *." 40

C.F.R. 1500.6(d)(1); 38 Fed. Reg. 20552. Since the major focus for federal coal leasing is the Northern Great Plains, it is clear that the example given in this provision of the Guidelines for a regional environmental statement is the very situation which is the subject of this litigation.

A CEQ staff memorandum dated December 28, 1973 is even more clear. It described how the Department of the Interior was violating the National Environmental Policy Act concerning coal development in the Northern Great Plains and stated that "the important requirements for adequate environmental analysis," *inter alia*, included (Addendum A to Appellants' Reply Brief in the Court of Appeals, p. A-5):

> Preparation of a draft "coal development program environmental impact statement" encompassing the regional and secondary impacts of coal development on Federal and Indian lands in the Northern Great Plains.

On January 15, 1974, that memorandum was sent by the Chairman of the Council to the Secretary of the Interior, with his own letter stating (*id.*, p. A-1):

> An extensive amount of coal is already committed for development—in the form of outstanding leases and pending applications for preference right leases —and the Council believes that this pending development must be given timely and careful examination, as required by NEPA.

More recently, in a "Memorandum to the Heads of Agencies" dated November 26, 1975, the Chairman of CEQ pointed out (p. 4):

> Agencies which sponsor incremental actions with cumulative significant impacts (e.g., individual coal leases or highway segments) should continue the practice of preparing program statements covering the cumulative environmental effects of the broader programs, as prescribed in Sec. 1500.5 of CEQ's Guidelines.

Finally, CEQ's position was presented at the hearing on February 16, 1975, before the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee by Chairman Peterson (Testimony, p. 7):

> CEQ interprets NEPA to require that a program environmental impact statement be prepared whenever a number of actions in a geographical area have cumulative impacts that cannot be adequately analyzed and treated in individual site specific environmental impact statements. The Department [of the Interior] recognizes this principle.

In response to supplementary questions posed by Senator Metcalf, Chairman Peterson again noted that "the Department has agreed to prepare regional coal EIS's. We commend that decision and stand ready to work with the Department outlining the range of impacts and alternatives to be considered in those statements." Peterson, Answers to Senator Metcalf's Supplementary Questions, filed with the Senate Interior Committee.

The other federal agency primarily entrusted with environmental concerns, the Environmental Protection Agency, has likewise concluded that the National Environmental Policy Act requires preparation of a comprehensive environmental impact statement before federal actions can be taken concerning coal development in the Northern Great Plains region. In identical letters to Secretaries Morton and Butz, the Administrator of EPA stated concerning coal development in the Northern Great Plains (Fed. Pet. App. A, p. 37A, note 28):

> Environmental impact statements prepared on a project-by-project basis in accordance with the National Environmental Policy Act are not adequate to evaluate the overall regional impact. What is needed is a comprehensive, systematic and interdisciplinary study of coal development in this region, similar to the Southwest Energy Study and the oil shale development program, which satisfies the letter and spirit of the National Environmental Policy Act.

The interpretations of these two agencies, CEQ and EPA, are entitled to substantial weight. CEQ was established by the Congress in NEPA itself. Congress directed CEQ "to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in Title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy * * *." 42 U.S.C. 4344(3). Section 101(a) of Title I of NEPA describes the broad concerns of the Congress regarding the effects of such activities as high-density urbanization, industrial expansion, resource exploitation and technological advances.

The President, by executive order, further defined the function of CEQ. Executive Order No. 11514, March 5, 1970; 35 Fed. Reg. 4247. Among other responsibilities, CEQ was directed to "issue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102(2)(C) of the Act." *Id.*, Section 3(h). The CEQ Guidelines were issued pursuant to this responsibility.

EPA is entrusted with the administration and enforcement of a variety of statutes governing air and water

pollution, noise, and pesticides. The Clean Air Act of 1970 gave the Administrator of EPA particular responsibility to "review and comment in writing on the environmental impact of any matter" relating to any of the authority given the Administrator including "newly authorized Federal projects for construction and any major Federal agency action * * * to which section 4332(2)(C) * * * applies * * *." Section 309, 42 U.S.C. 1857h-7. Thus EPA, as well as CEQ, has particular, legislatively mandated, responsibility for carrying out the policies of NEPA.

It is of course well established that "[w]hen faced with a problem of statutory construction, the courts show great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Moreover, an administrative interpretation of a statute is entitled to special weight when it is adopted soon after passage. *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969); *Udall* v. *Tallman*, *supra*, 380 U.S. at 16. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are untried and new.'" *Power Reactor Development Co.* v. *International Union of Electricians*, 367 U.S. 396, 408 (1961). Accord, *e.g.*, *United States* v. *Zucca*, 351 U.S. 91, 96 (1956); *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 549 (1940); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933).

In keeping with this doctrine, numerous lower courts have specifically held that the CEQ Guidelines constitute a persuasive interpretation of NEPA. The Court of

Appeals for the Sixth Circuit has held, as to the Guidelines, that "[s]uch an administrative interpretation by the agency charged with implementing and administering the NEPA is entitled to great weight." *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1178 (1972). Similarly, the Court of Appeals for the Second Circuit stated in *Greene County Planning Board* v. *FPC*, *supra*, 455 F.2d at 421, that it would "not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies 'to foster and promote the improvement of the environmental quality,' * * * has misconstrued NEPA." Accord, *Natural Resources Defense Council* v. *Callaway*, 524 F. 2d 79, 86, note 8 (C.A. 2, 1975); *Robinson Community Club* v. *Volpe*, 506 F.2d 1366, 1370 (C.A. 9, 1974); *Ely* v. *Velde*, 451 F.2d 1120, 1135-1136, note 14 (C.A. 4, 1971); *Carolina Action* v. *Simon*, 389 F. Supp. 1244, 1247 (D. N.C.), affirmed, 522 F.2d 295 (C.A. 4, 1975); *Essex County Preservation Ass'n* v. *Campbell*, 399 F. Supp. 208, 212 (D. Mass. 1975); *Committee for Green Foothills* v. *Froehlke*, 5 ERC 1849, 1852, note 1 (N.D. Calif. 1973); *Forty-Seventh Street Improvement Ass'n* v. *Volpe*, 3 ELR 20162, 20164 (D. Colo. 1973); *Akers* v. *Resor*, 339 F. Supp. 1375 (W.D. Tenn. 1972); *Indian Lookout Alliance* v. *Volpe*, 345 F. Supp. 1167, 1171 (S.D. Iowa 1972), modified on other grounds, 481 F.2d 11 (C.A. 8, 1973); *Morningside-Lenox Ass'n* v. *Volpe*, 344 F. Supp. 132, 142 (N.D. Ga. 1971); *Environmental Defense Fund* v. *Corps of Engineers*, 325 F. Supp. 728, 744 (E.D. Ark. 1971). As Mr. Justice Douglas stated, sitting as Circuit Justice, in *Warm Springs Dam Task Force* v. *Gribble*, 417 U.S. 1301, 1310 (1974), as the agency "ultimately responsible for administration of the NEPA and most familiar with its requirements for Environmental Impact Statements * * *," CEQ's interpretation of the Act "is entitled to great weight * * *."

Thus, the Council on Environmental Quality and Environmental Protection Agency have concluded that the National Environmental Policy Act requires preparation of a regional statement concerning the Northern Great Plains. This judgment is now supported by that of the Department of the Interior itself. We submit that this judgment is entitled to great weight and is correct.[97]

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[97] The federal petitioners argue (Fed. Br. 28) that preparation of a regional environmental statement for the Northern Great Plains would cause undue delay in the "efforts of this Nation to use coal * * *." First, respondents submit that there has been ample

III.

NORTHEASTERN WYOMING, EASTERN MONTANA AND THE WESTERN DAKOTAS ARE THE APPROPRIATE REGION FOR A REGIONAL ENVIRONMENTAL IMPACT STATEMENT CONCERNING COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS

We have seen above that the Department of the Interior has decided, consistent with the requirements of NEPA, to prepare regional environmental statements.

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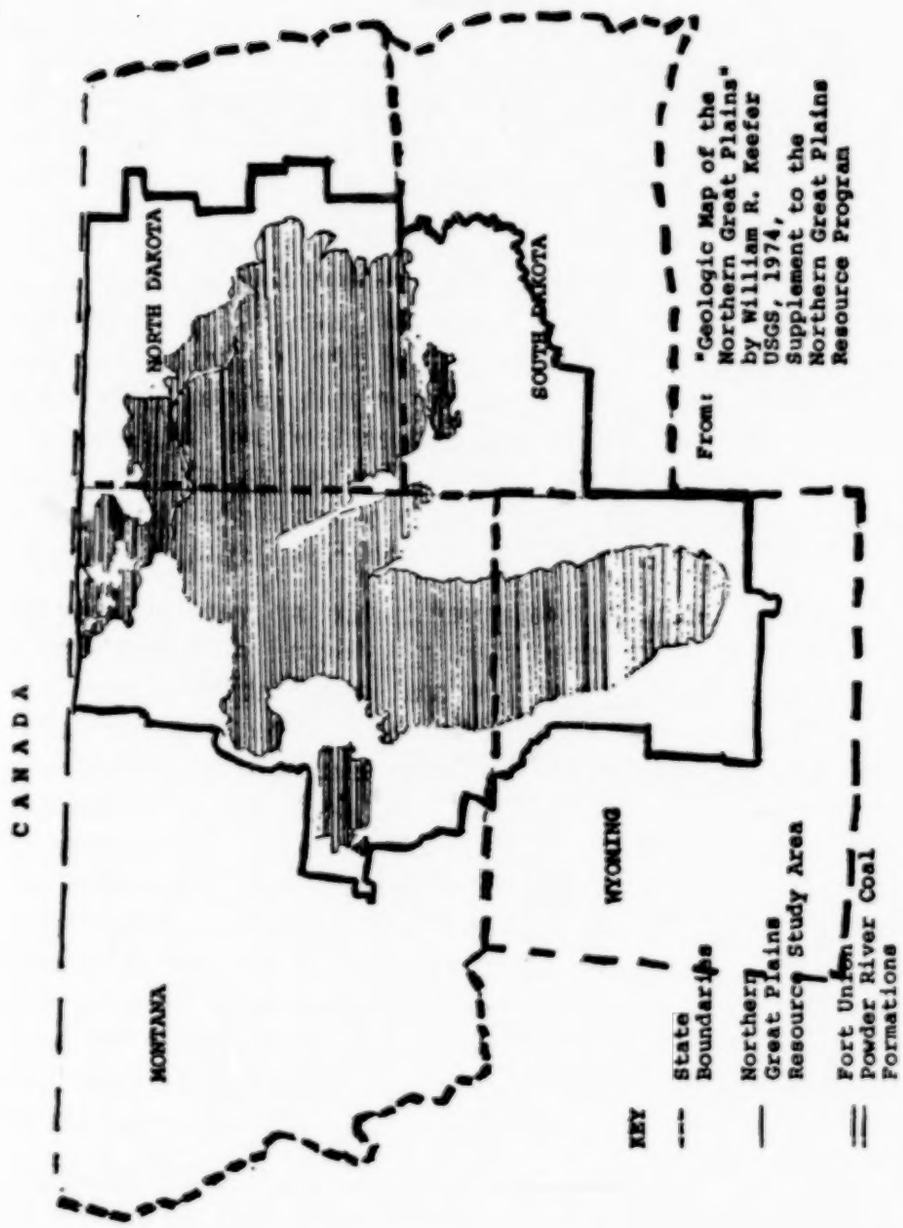
time since Secretary Morton urged the Department of the Interior in 1972 to demonstrate its responsible resource development capacity to have carried out the program he described. App. 130. While the Northern Great Plains Resources Program did not prepare an environmental impact statement, the report which it published could serve as the basis for a regional statement. It would require, with the other data available on the region, only modest additional effort. There can be no comparison between the time spent on the Coal Programmatic Statement, which has a national overview of federal coal leasing, with that which would be necessary to develop an adequate environmental analysis of the Northern Great Plains region. The federal petitioners place little faith indeed in the work of the Northern Great Plains Resources Program when they make such a claim.

We strongly emphasize that an adequate regional environmental statement need not be nearly so long as the Eastern Powder River Statement. Instead of being encyclopedic, it would be far more helpful to both decision-makers and the public if the regional statement carefully analyzed the impacts of development and factors involved in the real, basic alternatives (see pp. 92-94 above). Thus, CEQ has recently issued a memorandum to federal agencies urging that they make "specific efforts to use the impact statement as a management tool, and to focus the statement on analyses of impacts of a proposal and its reasonable alternatives * * *." CEQ pointed out that "[t]he statement does not achieve this purpose when it has such prodigious bulk that * * * no one at the decision-making level in any agency will ever read it. * * * [I]ts purpose is to clarify, not obscure, issues and to forecast and analyze significant impacts of a proposal and its reasonable alternatives * * *." Russell W. Peterson, Chairman, CEQ, Memorandum for Heads of Agencies, February 10, 1976, pp. 2-3.



However, the Department is preparing such statements on five subregions of the Northern Great Plains region. We submit that this determination is clearly erroneous because it fails to carry out the purpose of NEPA to analyze all the environmental impacts, effects, and alternatives of the related federal actions.

We submit that the proper region for analysis in a comprehensive environmental statement is northeastern Wyoming, eastern Montana and the western Dakotas, the region described in the complaint (App. 11). This region was not arbitrarily determined by respondents. Instead, it is a geologic fact. The extent of the region is defined simply by the presence of coal—the Fort Union and Powder River coal formations. See map on page 103.

The coal area is, we submit, the appropriate region for analysis. The many energy-related activities, such as electric power plants or coal gasification plants, derive from the presence of the coal. The transportation components, be they railroads, or slurry or gas pipelines, or power transmission lines, are designed to transport coal or its products. The so-called secondary effects of such development—population growth and conversion of an agricultural region into an industrial complex with the concomitant radical alteration in the area's social and economic patterns—all will take place because the coal is there. This mineral resource therefore is both responsible for the activities and at the same time delimits the geographic area in which they will take place.

The federal petitioners themselves recognized this area as the proper one for study and analysis. Secretary of the Interior Morton, on June 30, 1972, stated that "[t]he vast reserves of coal in the Fort Union Region of Montana, North Dakota, South Dakota and Wyoming provide an excellent opportunity for this Department to demonstrate how a responsible Federal agency can manage resource development with proper regard for environmental protection" (App. 130). On July 18, 1972, Secretary Morton wrote Senator Mansfield that "[w]hat is needed * * * is a major comprehensive study * * * to arrive at a sound plan for regional development of the Montana, North Dakota, South Dakota and Wyoming areas associated with the Fort Union and Powder River Coal formations" (Ct. of Appeals App. 72). The Department of the Interior told the Senate Interior Committee in 1972 that it was developing "a regional development plan or framework for the Montana, Wyoming, North Dakota and South Dakota area associated with the Powder River and Fort Union coal formation. The objective is the wise development of the region accomplished in full realization of social, economic and ecological consequences of alternative possibilities." Federal Leasing and Department Policies, Hearings before the Senate Interior Committee, 92d Cong., 2d Sess. 189 (1972). The Administrator of the Environmental Protection Agency wrote the Secretaries of the Interior and Agriculture concerning the need for a study of "the Fort Union coal region of Montana, North Dakota, South Dakota and Wyoming" in order to satisfy "the letter and spirit of the National Environmental Policy Act" (Fed. Pet. App. A, p. 37A, note 28). The Chairman of the Council on Environmental Quality sent the Secretary of the Interior a memorandum which stated that an environmental impact statement was needed "encompassing the regional and secondary impacts of coal development on Federal and Indian lands in the Northern Great Plains." Addendum A to Appellants' Reply Brief in the Court of Appeals, p. A-5.

The Northern Great Plains Resources Program was a major undertaking of numerous federal agencies, including the Bureaus of Reclamation, Mines, Land Management, Sport Fisheries and Wildlife, Indian Affairs and Outdoor Recreation; the National Park Service; the Forest Service; the U.S. Geological Survey; the Corps

of Engineers; the Atomic Energy Commission; the Departments of Labor, Commerce, Housing and Urban Development and Health, Education and Welfare; the Environmental Protection Agency; and agencies from the States of Montana, Wyoming, North Dakota, South Dakota and Nebraska (Ct. of Appeals App. 203-205, 216). It was created to "assess the potential social, economic and environmental impacts which would result from future development of the vast coal deposits and other resources * * * in five Northern Great Plains States—Montana, Wyoming, North Dakota, South Dakota and Nebraska. Memorandum of Secretary Morton (App. 130); Department of the Interior News Release (App. 132). However the Department of the Interior explained that the "focus will center on the study area, and particularly Powder River and Fort Union resources * * *" (App. 137). The study area in northeastern Wyoming, eastern Montana, and the Western Dakotas is shown in the map on page 103. As is readily apparent, the study area—which coincides with the region defined by respondents in their original complaint—simply follows the line of the coal deposits.

The federal petitioners argue (Fed. Br. 34-35) that the only basis for the conclusion of the court of appeals that respondents' definition of the region is appropriate was the "existence of the Northern Great Plains Resource Program." However, the region as defined in that Program of the federal petitioners themselves is obviously of great significance. In any event, petitioners ignore the physical fact of the existence of coal in a specific area and entirely reverse the logical order. The complaint and the NGPR Program defined this region because of the existence of that coal, rather than the other way around. Thus, the Department of the Interior, like respondents, concluded that northeastern Wyoming, eastern Montana, and the western Dakotas were the appropriate area for regional analysis because

of the contiguous coal formations which are located there.

Moreover, if the Northern Great Plains region is analyzed in five or more separate subregional environmental statements, the cumulative impact and effects of development cannot be adequately determined. The Eastern Powder River Statement principally focuses on only one and a half counties of northeastern Wyoming. We have seen above that the Yellowstone and Missouri Rivers drain the entire region. Thus, the consumption of water by various coal-related projects and the discharge of pollution by these projects is cumulative for the entire region. There is widespread concern in South Dakota that the construction of slurry pipelines in Wyoming using ground water from the Madison Formation which extends into the former State will affect water supplies there. Similarly, air pollution will readily cross the boundaries of the subregions which the Department of the Interior has defined. For example, the coal region in southeastern Montana, where several power plants and gasification plants are proposed, is directly north of the Powder River Basin. In addition, it is expected that many of the employees of the projects in southeastern Montana will live in northern Wyoming, which will add to the enormous population increases in that area. Nonetheless, the Powder River Environmental Statement, in considering the air pollution and population increases which will result from industrial development, considers only projects within the basin itself. See pp. I-461, I-554. Effects on climate will be cumulative for energy facilities throughout the region.

Several of the basic alternatives we have discussed above (pp. 76-77, 92-94) can also only be analyzed in a region-wide environmental statement. A subregional statement cannot consider whether strip mining and related energy-development should be concentrated in only a portion of the Northern Great Plains or whether strip

mining should be restricted to areas where the likelihood of reclamation is best. These alternatives can only be fairly considered by comparing the various subregions in an overall analysis. For example, even though the NGPR Program Report concluded that "[t]he poorest rehabilitation potential [in the entire Northern Great Plains is] recorded for Campbell County" (p. 53), one of the counties considered in the Eastern Powder River Statement, the statement did not look beyond that county's border to compare other coal areas of the Northern Great Plains or consider them as an alternative source of coal. Similarly, the allocation of water supplies, water pollution, or air pollution requires examination of these regional problems on the basis of the entire region.

In short, the Department of the Interior itself recognized in the Northern Great Plains Resources Program that comprehensive analysis of the effects of, and alternatives to, coal development in the Northern Great Plains must consider the entire region. We submit that this conclusion was clearly correct because subregional analysis of many effects and alternatives can clearly not be done. The Department's belated decision to divide the region into numerous subregions is inconsistent with its duty to carry out adequate environmental analysis under NEPA and is therefore invalid.

IV.

EVEN IF THE DEPARTMENT OF THE INTERIOR'S DECISION TO DO ENVIRONMENTAL STATEMENTS ON SUBREGIONS OF THE NORTHERN GREAT PLAINS COMPLIES WITH NEPA, FURTHER FEDERAL ACTION MAY NOT BE TAKEN WITHOUT PREPARATION OF ADEQUATE SUBREGIONAL STATEMENTS

We have contended above that the proper scope for a regional environmental impact statement, as the Department of the Interior and other federal agencies so

repeatedly recognized, is the entire Northern Great Plains. If this contention is upheld by this Court, it follows that their regional environmental impact statement must be prepared prior to further federal actions being taken.

Even if, however, this Court determines that the Department of the Interior can satisfy the requirements of NEPA that a comprehensive environmental statement be prepared on coal development in the Northern Great Plains through subregional statements, further federal actions may not be taken until adequate subregional statements have been prepared. The Department of the Interior has only prepared a subregional statement as to the Eastern Powder River Basin. While it is beginning to do other statements, further federal actions cannot be taken in those areas until those statements are completed.

The Department of the Interior recognizes that further actions cannot be taken in areas outside the Eastern Powder River Basin until the appropriate subregional statements are completed. Secretary Kleppe's announcement of the new coal leasing policy specifies that further leasing will be preceded by appropriate analysis (AEP Br. App. 8a, 11a):

> When a leasing action is considered, we will undertake a thorough analysis to determine the effects of the proposed action on the environment. In accordance with the National Environmental Policy Act, when the proposed action is determined to be a major Federal action, an environmental impact statement will be prepared before any specific lease or group of leases is offered.
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> In areas where a regional environmental impact statement is warranted, if an individual action meets the short-term criteria, and where approval is

> required before completion of the regional statement, an environmental assessment will be made. *If, as a result of the assessment, the proposed action is determined to be major in scope, approval of that action will be withheld pending completion of the regional environmental impact statement.* (emphasis added)

In addition, we submit that the Eastern Powder River Environmental Statement, even if deemed adequate as to its scope, does not satisfy the requirements of Section 102(2)(C) of NEPA. That statement barely mentions, or does not discuss at all, the basic alternatives concerning coal development which we have discussed (pp. 92-94 above). As just one example: even though the statement focuses principally on four strip mines and a railroad, it dismisses the alternative of a slurry pipeline instead of the railroad in just over one page, and without any analysis which could possibly allow the decision-maker to choose which alternative was environmentally preferable. Eastern Powder River Statement, pp. I-697 to I-698.

However, the adequacy of the Eastern Powder River Statement is not before this Court. Since neither the draft nor final statements had been issued when the complaint was filed or the district court made its decision, the statement was not, and could not have been, considered in that court. When the federal petitioners lodged the draft statement in the court of appeals, the court asked the federal petitioners to explain its significance to the litigation. Letter of Robert A. Bonner, Chief Deputy Clerk to Edmund B. Clark, Department of Justice, September 13, 1974. The government replied (Supplemental Memorandum of the Federal Appellees, September 27, 1974):

> We call the Court's attention only to the existence of these draft impact statements. Because the contents of the statements are not relevant, there is nothing missing from the statements that could be relevant in any respect to this case.

As a result, the court of appeals merely concluded that, as to the Eastern Powder River Statement and two environmental statements on individual mining plans, "[t]here has been no contention that any of these individual statements comprehensively study the regional impact of coal development in the Northern Great Plains, and our examination of the statements makes it clear that they do not do so." Fed. Pet. App. A, p. 11A, note 15. Thus, the court concluded only that the Eastern Powder River Statement was inadequate to constitute a regional statement for the entire Northern Great Plains; no argument was made or consideration given as to whether it was adequate if the proper scope of a regional statement was only a small section of the broader region.

It would of course be inappropriate to litigate the adequacy of a lengthy, complex environmental impact statement for the first time in this Court. We therefore submit that the issue should either be remanded to the district court or simply left for respondents to litigate in a separate suit.[98]

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[98] The petitioners raise some question of respondents' standing. Fed. Br. 10, note 15; AEP Br. 5, note 1. Neither the district court nor the court of appeals found that any of the respondents lacked standing to bring this litigation. The court of appeals, however, indicated that proof of standing was required, where controverted by the defendants, and that only the respondent Northern Plains Resource Council submitted such proof in the form of affidavits (Fed. Pet. App. A, 20A, note 20).

The suit was brought by seven national and state organizations on behalf of themselves and their members. The complaint alleged that members of the organizations, who are residents and land owners in the Northern Great Plains region, would suffer a variety of harms from improper coal development (App. 9). Those who are ranchers and farmers are threatened by destruction of land, diversion of water, pollution of ground and surface water, and harm to animals, crops, and vegetation from the inevitable increase in air

pollution. Those engaged in the recreational industry are threatened by the loss of habitat for wildlife, by the harm to wildlife from air and water pollution, by destruction of open lands, by harm to fish through diversion or pollution of water, and by vastly increased population. All residents of the area or visitors to it are threatened by being forced to breathe polluted air, by loss of recreational opportunities, and by esthetic damage from constructing power plants, transmission lines, railroads, highways, and new or enlarged towns and cities. The answers of defendants merely denied the complaint's allegations with flat, conclusory statements.

The only party which stated any basis for a denial of standing or raised it in litigating the cross-motions for summary judgment was intervenor Westmoreland Resources in its Memorandum of Points and Authorities in Support of Its Motion for Partial Summary Judgment. In response to Westmoreland's claim that none of the plaintiffs had shown standing as to Westmoreland's particular mine, the affidavits of the Northern Plains Resource Council were filed and found sufficient by the district court. The district court found, in accordance with the allegations of the complaint, that members of the plaintiff organizations "live, work, engage in recreational activities, own land and hold surface rights on or immediately adjacent to the sites of coal mining and related activities in the four-state area * * *" (Fed. Pet. App. A, p. 86a).

Respondents submit that the allegations contained in their complaint fully satisfied the test for standing stated by this Court in *Sierra Club* v. *Morton*, 405 U.S. 727, 739 (1972) "that a party seeking review must *allege* facts showing that he is himself adversely affected * * *" (emphasis added). Moreover, this question is fully answered by this Court's statement in *United States* v. *SCRAP*, 412 U.S. 669, 688-689 (1973): "A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action * * *. If, as the [appellants] now assert, these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact." Thus, even as against a motion to dismiss on the ground of standing, the allegations of the complaint were enough, so long as they stated a "specific and perceptible harm." *Id.* at 689-690. Since respondents herein responded to the only challenge raised by a motion for summary judgment, the requirements set forth by this Court have been met.

If, however, this Court requires proof of standing, in addition to a well-pleaded complaint, even though the defendants have not challenged the factual basis of the allegations, the court of appeals properly held that sufficient proof had been introduced as to the Northern Plains Resource Council (Fed. Pet. App. A, 21A, note 20). As to the other plaintiffs, if further proof of standing were deemed

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

BRUCE J. TERRIS
NATHALIE V. BLACK
SUELLEN T. KEINER
1908 Sunderland Place, N.W.
Washington, D.C. 20036

Attorneys for Respondents

April 1976

to be required, then respondents ask that this issue be remanded to the district court where respondents could provide ample evidence of the direct harm these members would suffer as a result of the federal petitioners' actions. Cf. *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 735, note 8.

APPENDICES

APPENDIX A

TESTIMONY OF THE HONORABLE THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON MINERALS, MATERIALS AND FUELS, SENATE INTERIOR COMMITTEE, FEBRUARY 16, 1976

I appreciate the opportunity to appear before the Subcommittee on Minerals, Materials and Fuels to discuss the Department's new coal leasing policy and to respond to the issues which the Chairman raised in his letter of January 28.

Since we have furnished the Committee with copies of our Statement on New Coal Leasing Policy which we issued on January 26, I will not restate the background which brought us to the new coal leasing policy. However, I would like to briefly reiterate the components of that policy before we comment on specific matters raised by the Subcommittee:

The new policy is designed to:

—create a balance between the need for coal and the need to protect the environment

—assure a fair market return to the taxpayer for the sale of this public resource

—assure that we lease only that coal which is needed by the Nation and only when it is needed

—assure the leasing of that coal whose value exceeds the total cost of production, including environmental costs

—eliminate excessive lease holdings

—assure public participation in the Federal coal leasing process

We believe that the policy we have announced will accomplish all these goals and provide a rational and sound basis on which leasing decisions can be made. The new policy combines a number of features which must be viewed together.

A. EMARS.

The first feature of the policy is implementation of a coal leasing process, called the Energy Minerals Activity Recommendation System or EMARS. Its purpose is to tell us where, when, and under what conditions coal should be offered to meet national needs so we can consider whether and how it should be offered for lease. There are four basic steps in the EMARS process:

1) land-use planning

2) nomination of coal tracts for lease

3) environmental analysis, and

4) coal resource evaluation

The Bureau of Land Management is preparing land-use plans, called Management Framework Plans, which will identify and inventory not only the minerals, but other values as well, including agriculture, grazing, wildlife, recreation and water resources.

After completion of the Management Framework Plans, the next step is nominations of tracts of land for leasing. Periodically industry, the States and the public at large will be called on to identify tracts either as appropriate for leasing or as inappropriate for environmental or other reasons. A comparison of the information obtained through the nomination system and the basic data contained in the Management Framework Plans will serve as the basis for initially judging what areas, if any, should be considered for lease.

If that initial judgment is to lease a particular area, a thorough analysis will be undertaken to determine the effects of the proposed action on the environment. If the action is determined to be a major action significantly affecting the quality of the human environment, an environmental impact statement will be prepared pursuant to the National Environmental Policy Act before any lease or group of leases is offered.

In some cases, mining coal from one or more leases might have substantially broader significance than the direct impact of the particular lease operations and may set the course of development for geographic areas encompassing both Federal and non-Federal lands. In such instances, as determined by the Secretary, the Interior Department will prepare a regional environmental impact statement before deciding to proceed. The region covered will be determined by basin boundaries, drainage areas, economic interdependence, and other relevant factors.

The final step in the EMARS lease process is the calculation of the economic value of the individual coal deposits which are being considered for lease. The Geological Survey has developed improved methods for valuing coal and they will be utilized in the EMARS system. The purpose of the valuation is two-fold: first, to ascertain whether the value of the coal itself is sufficient to warrant the environmental risks of actual mining and second, to determine the adequacy of the bids.

These four elements of EMARS will give us the basis for a reasoned judgment about whether any proposed leasing is in the public interest. One additional factor will, however, play a critical role and that is the marketplace itself, for the market will ultimately decide whether any leasing will occur.

Under this new coal lease policy, new leasing of Federal coal will be made under a competitive lease system.

However, existing preference right lease applications will be processed in a timely fashion, giving priority to those proposed leases which meet the short-term criteria.

B. Regulations for mining operations and reclamation.

Perhaps the second most important element of our new coal lease policy involves new regulations governing both mine operations and mined land reclamation on Federal coal lands.

I am firmly committed to meeting our Nation's energy needs by using the full array of alternatives reasonably available to us—both to increase supplies and to encourage conservation. But I am also determined that we cannot sacrifice our important environmental protection goals. With respect to coal on Federal lands, this means we must have a strong program of mine operation and reclamation. Developing effective regulations to protect land and environmental values without arbitrary or unworkable limitations is one of my highest priorities.

The proposed regulations most recently available for general public comment were published by the Department on September 5, 1975. They sought to accommodate legitimate concerns for adequate environmental protection while meeting expanded coal needs. We have now received more than 100 comments, totalling more than 1,000 pages of detailed and constructive review of our regulations.

The Department is preparing an environmental impact statement on these regulations pursuant to the National Environmental Policy Act. Since my decisions concerning these regulations will be based in part on the Statement, I am not in a position to resolve any of the issues concerning them at this time.

I would, however, like to discuss some of the issues you have previously raised with the Department, mention briefly recommendations that have been made to me which address these issues, and note some of the alternatives that have been presented for my consideration.

First, concern has been expressed that specific language contained in earlier proposed regulations was deleted from the draft published in September. The Task Force which has been reviewing the proposed regulations has endeavored to retain all of the substantive elements of earlier drafts. There has been some elimination of duplication, and some clarification of language, but we intend to retain the essential elements.

Second, it has been suggested that the regulations fail to place a burden of proof of reclamation capability upon the operator, or to require written findings with respect thereto by the Department that the capability exists with the operator. In issuing a lease or approving a mining plan, the test set forth in the proposed regulations is that such actions may take place only when the reclamation required by the regulations is "attainable and assured." The burden of establishing that fact is clearly upon the operator, for without such facts the administrative jurisdiction of the appropriate officers of the Department would not exist. To insure that this is the case, the recommendations now proposed for my consideration include two additional measures.

At the request of any person having an interest which might be adversely affected, a public hearing would be held for any of four categories of actions: issuance of a lease, the approval of a mining plan, the release of a bond, and the final abandonment of operations. In addition, with respect to all major decisions and determinations by Departmental officers, the regulations would require that written findings be made to which the public

would have access. These findings could include not only the action taken, but the factual basis and the rationale for that decision. This requirement would not apply to each day-to-day individual action of the officers involved, but we would expect that it will form the basis for effective public participation in the regulatory processes. Public participation is vital in large part because of the nature of the mechanisms that have been set forth to adopt and enforce the actual requirements that will apply to each operation.

In any enforcement program, appropriate flexibility is necessary. Within limits, we need to recognize that each mine is different, and specific environmental protection requirements may vary significantly even within a given geographical area. Review of the environmental impact statement indicates to Interior that there are basically two possible ways of providing needed flexibility. On the one hand, it has been recommended that the Department set forth very precise, detailed performance standards but allow for the granting of variances from these standards based upon individual circumstances. On the other hand, the proposal that was published in September allowed for somewhat greater flexibility in the performance standards themselves, but envisioned application of the standards to each operation on an *ad hoc* basis at the time a mine plan is approved.

The current draft regulations follow the original proposal. The language has been modified in several respects. The definition of "maximum extent practicable" has been tightened, and a separate procedural mechanism has been created to insure that qualification of standards by this language does not result in abuse.

Applicability of state laws is yet another difficult issue requiring resolution. Departmental representatives have been conferring at length with representatives of the states in which Federal coal is a major potential energy

resource. I share the concerns that they have expressed and fully recognize the legitimacy of each state's interest in preventing environmentally destructive mining practices. On the other hand, I also recognize that Federal coal is a national and not just a state resource. In administering this national resource, it would be a denial of my duties as Secretary to turn over the ultimate question of whether coal may be produced to any other authority.

Moreover, a considerable amount of Federal coal is adjacent to private lands. It is obviously in the best interests of all concerned if such coal is developed in a coordinated manner. To the extent possible, the same or similar restrictions should apply and any economies of scale that might arise from reducing overlapping jurisdiction should be pursued at both the Federal and state level.

With these concerns in mind, the current draft regulations would allow me to review state laws and, in a rulemaking proceeding, determine that in those states afforded more stringent environmental protection than Federal regulations, the appropriate State laws will be applied with respect to Federal coal so long as State law does not obstruct development of the Federal resource. Mining Supervisors would include the terms of the state laws involved as a condition of their approval of a mine plan. I am informed that this language is acceptable to the affected Western States and reflects appropriately their concerns.

Mr. Chairman, the proposed regulations are complex, and the alternatives to the recommendations of which I have been presented are many. This brief outline is intended only to address some of those areas of particular concern that you or your staff have identified. The proposed regulations which I am currently reviewing make

many more changes. I am sure you will agree with many of them. We would require, for instance, much broader notification to the public, through the *Federal Register* and elsewhere, of major pending decisions about to be taken. We have expressly provided for recognition of State law. The period of liability under a revegetation bond may be extended under the proposed regulations for an additional five years, and reclamation of affected lands as contemporaneously as practicable with ongoing operations is more clearly provided.

An important question that I will be asking myself as I review these regulations, Mr. Chairman, is will these regulations be effective in implementing stringent environmental protection standards. As I review the recommendations, I intend to make sure that these regulations are tough, that they are enforceable, and that they have the necessary flexibility to get the job done. Moreover, they should insure that the job will be done in full view of all interested parties.

C. Diligent development.

There are at present some 16 billion tons of Federal coal under lease, most of which had been leased prior to Secretary Morton's 1971 leasing moratorium. Although this might appear enough to meet demand for years to come, in reality, we do not know whether the coal leased prior to the moratorium is sufficient, or how much of that coal is suitable for actual mining. We do know that a substantial portion of that leased coal is not suitable for mining due to environmental and economic conditions. In order to more accurately determine the fate of this leased coal and to eliminate excessive lease holdings, we have promulgated standards which will require diligent development—or relinquishment—of new or existing coal leases. Under these new standards, a lessee must have mined at least one fourtieth, or 2½%, of the

reserves of his lease within the first ten years of the lease. Moreover, he must pay advance royalties beginning in the sixth year of the lease, based on a production schedule that would exhaust the lease reserves in forty years. In addition, the royalty rates have been increased. The normal rate will be eight percent of the value of the coal at the mine-mouth. This rate may be varied, up or down, for good cause in particular circumstances, but in no case will the royalty rate be less than five percent.

In response to the Chairman's concern, we are aware that the Mineral Leasing Act of 1920 provides that advance royalty payment may be made in lieu of continuous operation of the mine. However, the requirement that one-fourtieth of the lease be mined by the end of the tenth year will necessitate a substantial commitment of capital by the lessee. This required initial commitment of equipment and manpower, coupled with the substantial advance royalty payment, will be a sufficient economic incentive to encourage diligence, regardless of the continuous operations requirements.

The effect of these new requirements will be to assure that the coal most likely to be produced will be developed in a timely fashion and that coal under lease which is not readily producible will be returned to the Federal estate.

D. Preference right leases—commercial quantities

In addition to the Federal coal already under lease, there are some 192 preference right lease applications pending which must be acted upon. They involve an estimated 10 billion tons of coal.

For some time, the Department has felt the need to provide a more realistic basis on which to accept or reject preference right lease applications. Heretofore the

definition of "commercial quantities" applied under the Mineral Leasing Act was simply whether the coal existed in the proposed lease area and whether it was suitable for mining under current technology.

In undertaking the development of a new coal mine, any prudent businessman would consider the costs of actual mining, of transporting his coal to market, and the cost of meeting the environmental protection requirements. These cost considerations would have to be weighed against the value of the coal itself. Therefore we have published a proposed new definition of the term "commercial quantity" which more clearly defines those factors which any prudent businessman would consider. With the final promulgation of this new definition, we will be able to determine which preference right lease application now pending must be granted or should not be granted based on practical or prudent business criteria.

The Subcommittee has raised the question of the relationship of a preference right leasing system prescribed in the Mineral Leasing Act and the provisions of the National Environmental Policy Act. Section 101 of NEPA requires that the Federal Government interpret and administer public laws of the United States "to the fullest extent possible" in accordance with the policies of that Act. In the opinion of our Solicitor, NEPA is not sufficient to deny an application for a lease under the preference right leasing system of the Mineral Leasing Act, if that applicant has met the test of "valuable deposit" and "commercial quantity" as prescribed by the statute. I am submitting a copy of the Solicitor's opinion on this subject for the Subcommittee's review.

E. Indian lands.

As a part of our new policy, we have established procedures for dealing with the coal leasing issue on Indian

lands. Briefly, I want to assure the Subcommittee and the tribes themselves that there will be no coal resource development on Indian lands without the full concurrence of the tribes. As trustees for the tribes, it is our responsibility to see that their desires with respect to coal development are met. Should a tribe decide to lease coal, it will be our responsibility to support that decision, providing it is determined to be in their best interests. The Department will therefore approve leasing on Indian lands where the tribal or Indian landowner wishes to dispose of the coal, where the terms and conditions of the lease are in the best interests of the Indian landowner, and where appropriate environmental safeguards have been imposed.

F. Interim policy—moratorium

These elements comprise the new coal policy. Until such time as the new system is fully in place and operational, we will continue to maintain a mechanism in which certain proposed leasing actions can be approved where they meet defined critical production needs. These so-called short-term criteria include the following terms and conditions:

—The proposed lease must be necessary for continuation of an ongoing mining operation, or

—The proposed lease must be necessary as a reserve against production in the near future, generally to fulfill production requirements within five years,

—In all cases, these special leasing actions will take place when conditions of NEPA have been met, and

—Limited leasing will be approved only when we are assured that the environment can be ade-

quately protected and the land can be adequately reclaimed.

Finally, with these actions, we feel there is no longer any need for continuation of the coal leasing moratorium imposed in 1971. The EMARS process, itself, once fully implemented, will tell us whether further leasing is necessary. The control points we have built into our leasing process, including Management Framework Plans, nominations, environmental analysis, resource valuation, competitive leasing, and diligent development, are all designed to assure that only coal which is necessary to the Nation will be leased. We are not in the business of leasing coal for speculation. We are in the business of seeing that these Federal coal resources are produced for the Nation's benefit.

G. Coal policy litigation

I would like to address the relationship of our coal lease policy to the suit now pending before the United States Supreme Court, *Sierra Club* v. *Kleppe*. The suit originally sought to enjoin further leasing actions and approval of coal mining plans within an area defined as the Northern Great Plains Region until such time as a Federal coal plan is devised for that region and an Environmental Impact Statement is prepared on that plan. As indicated earlier in this testimony, we intend, wherever necessary to complete regional Environmental Impact Statements, but of a different magnitude. The Northern Great Plains region, as the Subcommittee knows, encompasses portions of five States: Nebraska, Wyoming, North and South Dakota, and Montana. The regions we envision would have common basin boundaries, drainage areas, and economic interdependence. An example would be the region encompassed in the Eastern Powder River Environmental Impact Statement or another under preparation in Northwest Colorado.

But the real difference we have with the decision of the Circuit Court in the Sierra Club suit is not about a geographical issue, but a philosophical one. The suit would require that the Department prepare a development *plan* for coal in advance of leasing in the Northern Great Plains region. This would overly restrict the workings of the free market and implies a restructed role for the States. The Circuit Court opinion which the Government is appealing says, in effect, that the issuance of leases, rights-of-way, and other such actions evidence the Federal Government's control over development of natural and human resources in the region. We deny that we are controlling the development of resources in a region. Rather, we intend only prudent management of Federal coal resources. To assure otherwise is to advocate a new and perhaps dangerous role of Federal Government which denies any proper role for the market forces and for that matter, the States. We propose to involve the States in our process. We see no such role for the States in the system which the suit proposes. For this reason, we are hopeful that the Supreme Court will act favorably on our appeal.

I will be happy to answer any questions you might have.

APPENDIX B

EXECUTIVE SUMMARY AND DECISION DOCUMENT

PROGRAM DECISION OPTION DOCUMENT

THE PROPOSED FEDERAL COAL LEASING PROGRAM

December 16, 1975
Bureau of Land Management

* Notations in brackets are handwritten in the original.

PROPOSED FEDERAL COAL LEASING PROGRAM

Decision Paper and Summary of PDOD

The Bureau of Land Management has prepared a Program Decision Option Document which presents a thorough discussion of the proposed new coal leasing program and its major alternatives. This decision paper presents a brief summary of the PDOD and requests a decision on adopting the proposed coal leasing program or some alternative to that program, a decision on the incorporation of regional EIS's into the leasing program, a decision on the processing of non-competitive applications, a decision on the policy of Departmental review of coal leasing actions and additional considerations concerning lifting of the current leasing moratorium and the role of the short-term leasing criteria in the new program.

VII. *Decision on EIS Procedures*

The coal programmatic EIS, since it is not site-specific, will not satisfy the requirements of NEPA for all coal leasing actions, though it may for some.

Alternative strategies for the preparation of EIS's range from simple case-by-case determinations of whether an EIS is required, to the setting of guidelines on what stage of the leasing process is normally the best time for an EIS. One alternative would be to decide upon a limited number of regions, each of which is likely to have reasonably homogeneous characteristics, and set the guideline that the next permit or lease action in the area would call for an EIS on coal development in the whole region. The intention here would be that the one statement, or addendums of it, could serve for most or all actions in the region for a period of several years.

The procedures of BLM and GS for taking action related to issuing preference right leases, holding competitive lease sales, approving mining plans and issuing prospecting permits require that environmental analysis be

made of the operation to be carried out as a result of the proposed action and, if the actions are likely to have impacts significantly affecting the quality of the human environment, EIS's are prepared prior to taking the proposed actions. Where several impact statements are found to be required in the same areas, area wide, or regional impact statements have been prepared, i.e., Eastern Powder River in Wyoming and Northwestern Colorado. Regional impact statements have advantages of cost since they allow the sharing of factors of analysis common to several statements like description of natural and socioeconomic conditions, and they allow the analysis of cumulative impacts in an area, such as the effects of several operations on community services in a town or several towns. Regional impact statements may have the disadvantage of requiring a longer time to complete than would any statement for a single action included in the regional statement, thereby, holding the initiation of that single action until the entire regional statement is completed—not an insignificant public cost when very important projects are involved. Also, not an inconsiderable cost to a company which is eager to initiate an operation, i.e., a coal mine necessary to supply fuel for a new power plant.

In formulating a new coal leasing policy, it is necessary to decide on a policy for designing and preparing environmental analyses and environmental impact statements. Three distinct options are apparent: (1) Continue the policies of BLM and GS to conduct environmental analyses prior to issuing preference right leases, offering leases for competitive sale or approving mining plans or issuing prospecting permits and, if significant impacts affecting the quality of the human environment are likely, require the preparation of an EIS before taking the proposed action (if several EIS's are to be prepared in an area, a regional EIS will be prepared); (2) require a site-specific EIS to be prepared before issuing

any lease, offering any tract for competitive sale, approving any mining plan or issuing any prospecting permit and, where several EIS's are required in an area, prepare a regional EIS; and (3) require a regional EIS before issuing any preference right lease, offering any tract for competitive sale, approving any mining plans or issuing any prospecting permit, in an area.

Alternative M. Continue BLM and GS Policy.

Under this option, environmental analyses would be prepared before each key coal program decision. If the analysis concludes that an EIS is necessary for full compliance with NEPA, it would be prepared. Regional EIS's could be prepared when several EIS's are required in the same area.

Although most coal actions would require EIS's, some may not because the environmental analysis in such cases would show that impacts which would significantly affect the quality of the human environment are not likely to occur. This option allows such cases to be recognized and avoids delay while EIS's are being prepared. The option also allows flexibility in regard to regional EIS's by allowing an action to be taken after a site-specific EIS or regional EIS, whichever is found appropriate. By this option, a very important action might proceed on the basis of a site-specific EIS rather than delay the action while a more time consuming regional EIS is prepared.

This option could subject the Department to criticism of environmental groups who might accuse the Department of adopting a policy designed to circumvent preparation of impact statements before key leasing or approval actions.

The program proposal in the final coal EIS states:

> Whenever possible, several leases in the same region will be covered by a single environmental impact

statement rather than by multiple statements. In such cases, the region covered will be determined by basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries, areas of economic interdependence, and other relevant factors. In all cases, each coal lease, prospecting permit, preference right lease application or mining plan will be analyzed to determine whether or not an EIS is warranted. An environmental analysis will be prepared prior to issuing any competitive or noncompetitive lease, prospecting permit or mining plan approval. If the analysis indicates an EIS is necessary, an EIS will be prepared unless a previous environmental impact statement has sufficiently analyzed the impacts.

Alternative N. Require a site-specific EIS to be prepared before taking any significant coal program action except that a regional EIS may be prepared when several site-specific EIS's are required in the same area.

This option would declare that all major coal actions have impacts that would significantly affect the quality of the human environment and, therefore, should not be taken until an EIS is prepared. Such a policy would find favor with environmental groups. It would allow very important actions to proceed after preparation of a site-specific EIS rather than a more time consuming regional EIS if such an action were found appropriate by the Department.

This option could mean that actions which ordinarily would not have impacts significantly affecting the quality of the human environment would be delayed while an EIS was prepared—an unnecessary cost to the government and the private operation in both funds and opportunities foregone.

Alternative O. Require a regional EIS before taking any significant coal program action.

This option would also declare that all major coal actions have impacts that would significantly affect the quality of the human environment and, therefore, would not be taken until an EIS is prepared. This option would provide the greatest assurance that, after a regional EIS is completed, coal actions in the area covered by the regional EIS could be taken without environmental challenge. BLM estimates that about 30 regional EIS's (including 9 in eastern states) would be required to cover all areas where significant coal leasing is likely. Each regional EIS would require 12-18 months for completion.

This option would eliminate any flexibility for the Department in being able to initiate important actions on the basis of site-specific EIS's; and, therefore, would build a longer processing time uniformly into all key coal decisions. It would require a large commitment of manpower for several years until the 30 regional EIS's are completed. Regional EIS's in some of the high priority areas could be initiated with existing resources, other areas would require significant additional funding for BLM and USGS from future budget actions.

Decision.

Adopt:

——— Alternative M. Continue BLM and GS policy

——— Alternative N. Require site-specific EIS's or regional EIS's, if appropriate

[TSK] Alternative O. Require regional EIS's [as modified]

January 27, 1976

REVISED ALTERNATIVE "O"

Where an EIS is required under NEPA for a particular Departmental action, whether that EIS will be a regional EIS or a site-specific EIS, will be determined according to the following principles:

A. As a general proposition, and as determined by the Secretary, when action is proposed involving coal development such as issuing several coal leases or approving mining plans in the same region, such actions will be covered by a single EIS rather than by multiple statements. In such cases, the region covered will be determined by basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries, areas of economic interdependence, and other relevant factors.

B. In areas where the Secretary has determined that a regional EIS is to be prepared, if an individual action requires approval prior to completion of the regional EIS and, in the case of leasing activities, meets the short-term criteria, an environmental analysis will be completed. If the environmental analysis indicates that the individual action is such an integral part of the regional action that its environmental effects cannot be properly considered unless the regional EIS is completed, that action will be held until completion of the regional EIS.

C. In all other cases, each coal lease or mining plan will be analyzed and an environmental analysis prepared to determine whether or not an EIS is required. If the environmental analysis indicates an EIS is necessary to comply with

NEPA, a site-specific EIS, or a regional EIS, if a series of proposed actions with interrelated impacts are involved, will be prepared unless a a previous EIS has sufficiently analyzed the impacts of the proposed action(s).